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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 84

COMMISSIONER OF INTERNAL REVENUE,  
PETITIONER

FELHAM G. WEDGEHOUSE

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR HABEAS CORPUS FILED JUNE 2, 1948

WARRANT GRANTED OCTOBER 11, 1948

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**Petition to Tax Court.**

(Filed November 14, 1944.)

(Cert. Tr., Rec. on Review, pp. 3-22.)

**TAX COURT OF THE UNITED STATES**

**Docket No. 6487**

**PILHAM G. WODEHOUSE,**

**Petitioner,**

—against—

**COMMISSIONER OF INTERNAL REVENUE,**

**Respondent.**

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated July 21, 1944, and as a basis of his proceeding, alleges:

1. Petitioner is an individual, a British subject formerly residing at Le Touquet, France, but since June, 1940, in the custody of the German government in territory under the control of the German army, and his present residence is reported to be in Paris. During the years involved herein prior to June, 1940, he was a resident of either England or France.

2. The notice of deficiency, a copy of which, together with the accompanying statement, is attached hereto and marked Exhibit A, was mailed to the petitioner on July 21, 1944.

*Petition to Tax Court.*

3. The taxes in controversy are income taxes for the following years in the following amounts, including penalties:

Year	Deficiency	Penalty	Total
1938	12,220.86	None	12,220.86
1941	2,802.08	None	2,802.08

4. The determination of tax set forth in said notice of deficiency is based on the following errors:

d. The inclusion in gross income of 1923, 1924, 1938, 1940 and 1941 of various non-periodical lump sum payments for literary property.

h. The inclusion in taxpayer's income for the calendar year 1938 of the sum of \$40,250, payments for literary property actually belonging to taxpayer's wife, Ethel Wodelhouse.

i. The inclusion in taxpayer's income for 1938 of payment for the use of literary property outside the United States.

k. The assertion of any deficiency for the year 1938 after the Statute of Limitations for such year had already run.

o. The inclusion in gross income for the year 1941 of \$2,550.50, representing payment for the use of literary property outside the United States, and therefore not taxable.

*Petition to Tax Court.*

5. The facts upon which petitioner relies as a basis of this proceeding are as follows:

a. Petitioner during the years 1923, 1924, 1938, 1940 and 1941 was a non-resident alien not engaged in a trade or business in the United States and having no office or place of business in the United States.

g. During 1938, taxpayer completed two stories entitled "Uncle Fred in the Springtime" and "Code of the Woosters" (formerly "Cow Creamer"). After completion and while outside the United States, he gave one-half interest in each story to his wife, Ethel Wodehouse, prior to the sale or other disposition of each story. Subsequent thereto, the entire copyright in each story was sold to the Curtis Publishing Company, in each case for a lump sum payment of \$40,000, and the latter story was sold as a novel to Doubleday Doran & Company for \$5,000 advance payment. During the period of publication of such stories in the Saturday Evening Post, that magazine circulated to the extent of approximately 6% outside the United States and the sums received were proportionately not taxable. During the taxable year, taxpayer incurred ordinary and necessary expenses of \$753.01 for attorneys' fees and \$400 for traveling expenses to Cannes, France, in connection with his literary work.

h. On or before June 15, 1939, taxpayer by his duly designated agent filed a true and complete return of all his income received from sources within the United States during 1938, in compliance with law. The permissible time for the assertion of any deficiency for the said year 1938 expired long before the mailing of the deficiency notice, Exhibit A, hereto annexed.



*Petition to Tax Court.*

j. During 1941, taxpayer sold to the Curtis Publishing Company the copyright to a story entitled "Money in the Bank" for a lump sum payment of \$42,500. He also sold to Collier's a story entitled "My Year Behind Barbed Wire" for a lump sum payment of \$2,000. During the publication of such stories, the magazines in which they were published were circulated approximately 6% and 4%, respectively, outside the United States and the sums received were to that extent not taxable. During said taxable year, taxpayer incurred ordinary and necessary expenses of \$1,661.82 for attorneys' fees in connection with his literary work.

k. On or before the due dates thereof, taxpayer by his duly designated agent filed true and complete returns of all his known income received from sources within the United States during 1940 and 1941.

WHEREFORE, petitioner prays that this Court may hear the proceeding and determine that there is no deficiency in petitioner's tax liability for 1923, 1924, 1938, 1940 and 1941, and no penalty due for any year, and further determine and allow to petitioner for 1938 a refund of \$1,121.89, for 1940 a refund of \$3,156.32, for 1941 a refund of \$14,290.12, with interest from the respective dates of payment, and that your petitioner may have such other and further relief as may be necessary or proper.

WATSON WASHBURN (sgd.)

WATSON WASHBURN,

Counsel for Petitioner,

36 West 44th Street,

New York 18, N. Y.

(Duly verified by Watson Washburn November 13, 1944.)

## EXHIBIT A, ANNEXED TO PETITION.

## TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

New York, N. Y.

Jul 21 1944

Mr. Pelham G. Wodehouse  
 c/o Perkins, Malone & Washburn  
 36 West 44th Street  
 New York 18, N. Y.

Dear Sir:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1923, 1924, 1938, 1940 and 1941 discloses a deficiency of \$31,370.85 and \$2,436.10 in penalty for the taxable years ended December 31, 1923 and 1924, as shown in the statement attached. Said deficiency has been assessed under the provisions of the internal revenue laws applicable to jeopardy assessments.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 150 days (not counting Sunday or a legal holiday in the District of Columbia as the 150th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States for a redetermination of the deficiency.

Very truly yours,

JOSEPH D. NUNAN, JR.,

Commissioner,

By C. B. ALLEN

Internal Revenue Agent in Charge.

Enclosure:  
 Statement.

*Exhibit A, Annexed to Petition.*

(From Deficiency Letter Dated July 21, 1944  
Annexed to Petition.)

Mr. Pelham G. Wodehouse

Statement

Taxable Year Ended December 31, 1938

## ADJUSTMENTS TO NET INCOME

Net income as disclosed by statutory notice of deficiency dated November 14, 1941	\$42,679.10
Unallowable deduction and additional income	
(a) Income from royalties	40,250.00
Net income adjusted	\$2,929.10

## EXPLANATION OF ADJUSTMENTS

(a) It is held that the amount of \$40,250.00 representing net royalties derived from your literary work and erroneously reported as the income of your wife, Ethel Wodehouse, constitutes income taxable to you.

In the computation of the deficiency disclosed herein a credit of \$4,250.00 representing income tax withheld from Ethel Wodehouse has been allowed inasmuch as the royalties from which this tax was withheld are held to be income taxable to you.

7  
*Exhibit A, Annexed to Petition.*

COMPUTATION OF TAX

Net income adjusted \$82,929.10

Less:

Personal exemption \$1,000.00

Balance (surtax net income) \$81,929.10

Less:

Earned income credit 300.00

Net income subject to normal tax \$81,629.10

Normal tax at 4% on \$81,629.10 \$ 3,265.16

Surtax on \$81,929.10 20,383.84

Total tax \$23,649.00

Less:

Tax withheld at source

Ethel Wodehouse \$4,250.00

Pelham G. Wodehouse 4,423.00 \$8,673.03

Tax previously assessed:

Original, account

No. 995430 \$1,633.22

Additional, account

No. 3 311306,

March 13, 1942 list 1,121.88 2,755.11 11,428.14

Deficiency of income tax \$12,220.86



*Exhibit A, Annexed to Petition.*

A Taxable Year Ended December 31, 1941

## ADJUSTMENTS TO INCOME

Net income as disclosed by return		\$38,557.02
Unallowable deductions and additional income		
(a) Other income	\$2,550.50	
(b) Doubleday Doran and Company Royalties	766.99	
(c) Attorneys' Fee	1,661.82	4,979.31
Net income adjusted		<u>\$43,536.33</u>

## EXPLANATION OF ADJUSTMENTS

(a) It is held that the amount of \$2,550.50 which was excluded from your income as allocable to royalties earned outside of the United States constitutes taxable income.

(b) Information on file discloses that your income from royalties from Doubleday Doran and Company was \$1,458.17 whereas you reported \$691.18 in your income from profession from that source. Therefore, your income has been increased by \$766.99.

(c) It is held that attorneys' fees of \$1,661.82 do not constitute ordinary and necessary expenses incurred in carrying on a trade or business and have, therefore, been disallowed.

*Exhibit A, Annexed to Petition.*

## COMPUTATION OF TAX

Net income adjusted		\$43,536.33
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Less:

Personal exemption		750.00
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Balance (surtax net income)		\$42,786.33
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Less:

Earned income credit		1,400.00
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Net income subject to normal tax		\$41,386.33
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Normal tax at 4% on \$41,386.33		\$ 1,655.45
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Surtax on \$42,786.33		15,436.75
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Total tax		\$17,092.20
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Less:

Tax withheld at source

Through Houghton Mifflin	\$ .87
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Through P. R. Reynolds & Son	7,342.50
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Through Doubleday Doran & Co.	105.28	\$7,448.65
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Tax previously assessed:

Original, account

No. 67980213	6,841.47	14,290.12
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Deficiency of income tax		\$ 2,802.08
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**Answer.**

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**[SAME TITLE.]**

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(Cert. Tr. Rec. on Review, pp. 23-26.)

The respondent, by his attorney, J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, for answer to the petition heretofore filed in this proceeding, admits, denies, and avers as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. a to p, inclusive. Denies the allegations contained in subparagraphs a to p, inclusive, of paragraph 4 of the petition.

5. a. Admits that petitioner during the years 1923, 1924, 1938, 1940 and 1941 was a non-resident alien, but denies the remainder of subparagraph a of paragraph 5 of the petition.

g. Admits that the Curtis Publishing Company made payments in 1938 aggregating at least \$80,000 for rights in stories written by the petitioner and that Doubleday Doran & Company made payments in 1938 aggregating at least \$5,000 for rights in a story written by the peti-

*Answer.*

tioner. Denies the remainder of subparagraph g of paragraph 5 of the petition.

h. Denies the allegations contained in subparagraph h of paragraph 5 of the petition.

. . . . .

i. Admits that the Curtis Publishing Company made payments to the petitioner in 1941 aggregating at least \$42,500 for rights in a story written by the petitioner and that Collier's made payments to the petitioner in 1941 of at least \$2,000 for rights in a story written by the petitioner. Denies the remainder of subparagraph i of paragraph 5 of the petition.

k. Denies the allegations contained in subparagraph k of paragraph 5 of the petition.

. . . . .

8. That the petitioner received taxable income from sources within the United States during the calendar year 1938 in the sum of \$87,784.69, to wit, the sum of \$80,000 from the Curtis Publishing Company, and the sum of \$7,043.57 from Doubleday Doran & Company, representing royalties derived from his literary work, and the sum of \$741.12 from other sources. The petitioner in his Federal income tax return for the calendar year 1938 failed to report the sum of \$45,217.09 of said income of \$87,784.69 derived from sources within the United States and thereby understated his taxable net income and Federal income tax liability for such year.

9. The petitioner in his Federal income tax return for the calendar year 1938 reported gross income of \$42,567.60 and failed to report the said sum of \$45,217.09 as gross income, and thereby omitted from gross income



*Answer.*

an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the said return. The petitioner's return for said year was filed with the Collector of Internal Revenue, Baltimore, Maryland, on June 15, 1939, and the deficiency now asserted by the Commissioner for said year was assessed on June 14, 1944 under the provisions of the internal revenue laws applicable to jeopardy assessments.

WHEREFORE, it is prayed that the appeal be denied and that the tax and penalties as shown in the deficiency notice be in all respects approved.

J. P. WENCHEL

RPH

J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue.

OF COUNSEL:

E. C. ALGIRE,

Division Counsel.

WALT MANDRY,

Special Attorney,

Bureau of Internal Revenue.

## Reply.

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[SAME TITLE.]

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(Cert. Tr. Rec. on Review, p. 27.)

The petitioner, by his attorney, Watson Washburn, Esq., for reply to the respondent's answer in this proceeding, pursuant to leave of this Court granted March 21, 1943, respectfully shows:

1. The petitioner denies each and every allegation in paragraphs 7, 8 and 9, of respondent's answer, except that petitioner admits that his return for the calendar year 1938 was duly filed on or about June 15, 1939.

WATSON WASHBURN,

Counsel for Petitioner,

36 West 44th Street,

New York 18, N. Y.

## Findings of Fact and Opinion.

8 T. C. No. 72

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[SAME TITLE.]

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(Cert. Ty. Rec. on Review, pp. 28-57.)

Docket Nos. 3401, 6487.

Promulgated March 28, 1947.

4. Alleged assignments to his wife of undivided one-half interest of petitioner in novels, etc., written by him, *Held to be*, for purpose of securing tax advantages, equivalent to community property status in California which petitioner, a nonresident alien, could not assume, and were based on no real donative intent. Proceeds from the sale of such literary works taxable to petitioner.

5. Lump-sum payments for serial rights to literary productions taxable to petitioner. *Sax Rohmer*, 5 T. C. 183, affirmed 153 Fed. (2d) 61, certiorari denied, 328 U. S. 862, followed.

6. Allocation of income between sources within and without United States denied.

7. Attorneys' fees allowed under section 23 (a) (2), Internal Revenue Code.

*Watson Washburn, Esq.*, for the petitioner.

*Walt Mandry, Esq.*, for the respondent.

VAN FOSSAN, Judge: The respondent determined de-

*Findings of Fact and Opinion.*

iciencies in the petitioner's income tax liabilities and imposed penalties as follows:

Docket No.	Year	Deficiency	Penalty
6487	1923	\$ 2,699.83	\$ 881.03
	1924	5,567.25	1,555.07
	1938	12,220.86	
	1940	3,080.83	
	1941	2,802.08	
3401	1937	21,328.82	10,664.41

The petitioner claimed overpayments of \$1,121.89, \$3,156.32 and \$14,290.12 for the years 1938, 1940 and 1941, respectively.

The cases before us present a number of issues, some common to two or more of the taxable years and some peculiar to a single year. They are best stated by relating them to the several taxable years. The facts pertinent to such issues and the opinions thereon will be set forth in the same manner.

The petitioner is a British subject, formerly residing at Le Touquet, France. From June 1940 until the date of the petition, November 13, 1944, he was in the custody of the German Government in territory controlled by the German Army. During the years prior to June 1940, he was a resident of either England or France. During the taxable years he was a nonresident alien, with the exception of the period hereinafter mentioned. The petitioner was unable to attend the trial of the proceeding because of the Government's restrictions on travel from France.

The petitioner was a prolific writer of serials, plays, short stories and other literary works. He is a well-known writer of stories and has a wide reputation as such in the United States. His writings were in demand by the public and were accepted and published by the Saturday Evening Post, Red Book, Liberty, Collier's, Cosmopolitan, and other such magazines. During the taxable years and for several



*Findings of Fact and Opinion.*

years prior thereto, the sale of the petitioner's writings in the United States was accomplished by one or more literary agents.

\* \* \* \*

[Note as to omitted matter: To avoid encumbering the record and to save expense, petitioner-on-review has not printed the separate divisions of the Tax Court's Findings of Fact and Opinion affecting the tax years 1923, 1924 and 1937, as to which petitioner prevailed in the Tax Court and has taken no appeal, and which involved no issue or contained no matter related to any question brought up for review. In addition, findings and opinion as to the year 1937 were in a separate proceeding consolidated for purposes of trial. The omitted portions appear at pages 30-44 of the certified transcript of the record, on review and in the official reports, 8 T. C. 638-647.]

\* \* \* \*

*The Year 1938**Issues:*

(1) The applicability of the statute of limitations under section 275 (c);

(2) The taxability to the petitioner or to his wife of payments for serial rights to novels and other literary works of which the petitioner was the author;

(3) The inclusion in income of jump-sum payments for literary productions;

(4) The allocation of income between sources within and without the United States;

(5) The disallowance of attorneys' fees.

*Findings of Fact and Opinion.*

## FINDINGS OF FACT

In the fall of 1936, on his way to Hollywood, California, the petitioner consulted his attorney Washburn (and his partner Malone) relative to his income tax status. Washburn advised the petitioner regarding the taxability of his salary. The petitioner then went to Hollywood and remained there for about a year. While there the petitioner wrote to Washburn in connection with his income tax return for the year 1936, filed in Hollywood on a community property basis. The petitioner considered that his entry into the United States under a quota visa made him a resident of this country. Washburn questioned that status but suggested that if the petitioner was a resident of France, the community property law of that country would govern and a community property return would be proper.

When the petitioner and his wife, Ethel Wodehouse, came East in the fall of 1937 they consulted Washburn again and were advised to consult their counsel in England with reference to their community property status. The petitioner stated that he and his wife had no agreement that would prevent a community property return; that they actually had a joint account usually; and had "no objection whatever to an equal share of their worldly gains." Washburn then advised them that if the petitioner wished to give his wife half of his property "he probably could achieve the same result as the community property jurisdiction by making a present to her of a half interest in his writings, if he did so before any income was realized from them." The petitioner acquiesced in the suggestion of his attorney. The assignment of January 3, 1938, was drafted by the petitioner's attorney.

After the petitioner returned to England he informed Washburn that his English barrister told him that he was domiciled in England. Thereupon Washburn prepared

*Findings of Fact and Opinion.*

amended returns for the petitioner on a separate property basis and the petitioner paid the required additional tax. Mrs. Wodehouse applied for a refund of the tax paid by her:

On January 12, 1938, Washburn received from Mrs. Wodehouse an assignment dated January 3, 1938, transferring to her an undivided one-half interest in the literary property, right, title and interest in and to a manuscript of an unpublished novel entitled "The Cow-Creamer", together with all profits arising from printing, publishing and selling it in serial or book form, in newspapers and magazines and from all dramatic, radio, motion pictures, etc., rights therein.

On October 15, 1938, Washburn received a similar assignment dated September 1, 1938, from the petitioner to his wife, of one-half interest in the copyright of, and the property in, a manuscript entitled "Uncle Fred in the Springtime". Upon the receipt of the above assignments Washburn duly notified the petitioner's literary agent, Reynolds, to make any contracts and payments from the sale of the novels for the joint benefit of the petitioner and his wife.

On October 22, 1937, the Reynolds Agency sent part of "The Cow-Creamer" (also known as "The Silver Cow") to the Saturday Evening Post (Curtis Publishing Company) and on February 5, 1938, delivered the remainder thereof to that company. On February 22, 1938, the Curtis Publishing Company accepted the story, "The Cow-Creamer", and sent its check for \$40,000 to the Reynolds agency on the same date. The memorandum of acceptance contains the following language:

This check is offered and accepted with the understanding that The Curtis Publishing Company buys all rights in and of all stories and special articles appearing in its publications and with

*Findings of Fact and Opinion.*

the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.

## MOTION-PICTURE RIGHTS

Please note that our reservation of serial rights (which includes publication in one installment) includes new story versions based on motion-picture or dramatic scenarios of short stories and serials that have appeared in Curtis publications, and that we permit the use of such versions only under the following conditions: \* \* \* When selling motion-picture or dramatic rights of matter, you must notify the producer to this effect, so that there may be no misunderstanding on his part and no infringement of our rights.

The Reynolds Agency remitted to the petitioner and to his wife each the sum of \$17,100, after deducting commissions and taxes. The book rights to "The Cow-Creamer" were sold to Doubleday, Doran & Company for \$5,000.

\* On December 13, 1938, the Curtis Publishing Company accepted the story "Uncle Fred in the Springtime" subject to the same agreement of reassignment of rights as that contained in its acceptance of "The Cow-Creamer", and paid \$40,000 therefor. The Reynolds Agency sent to the petitioner and to his wife each \$17,000 to cover the proceeds thereof, less charges. "The Silver Cow" was published from July 9th to September 3, 1939, and "Uncle



*Findings of Fact and Opinion.*

"Fred in the Springtime" was published from April 22nd to May 27th of that year.

The net paid average circulation of the Saturday Evening Post was as follows:

*Six months ending December 31, 1937:*

Within United States	3,037,562
Outside United States (including Canada)	189,867

*Six months ending June 30, 1938:*

Within United States	3,095,355
Outside United States (including Canada)	191,228

*Six months ending December 31, 1938:*

Within United States	3,061,009
Canada	139,739
Miscellaneous and foreign	54,985

*Six months ending June 30, 1939:*

Within United States	3,104,208
Canada	145,002
Miscellaneous and foreign	52,648

During 1938 the petitioner paid to Washburn, or his firm, \$753.01 for legal services in connection with his handling the petitioner's literary affairs and for advice concerning the preparation of the petitioner's income tax returns. Approximately one-half of this amount was paid for services relating to income taxes. No part of such sum was for advice as to the assignments of property to the petitioner's wife.

*Findings of Fact and Opinion.*

## OPINION

The applicability of the statute of limitations (section 275 (c)) is dependent upon the determination of the second issue, since the inclusion of the amounts paid to the petitioner's wife, in his income concededly increases his income more than the statutory 25 per cent. Therefore, we will first consider whether or not such payments may properly be charged to the petitioner's income.

The respondent does not challenge the form of the assignments executed by the petitioner transferring to his wife one-half of his interest in "The Cow-Creamer" and "Uncle Fred in the Springtime" but he does contend that such assignments were designed solely to prevent the taxation of all the petitioner's income to him. A careful and comprehensive study of the entire record before us leads to the conclusion that the respondent's contention is well founded.

It is axiomatic that a taxpayer may take all proper measures to reduce his tax liability. The question is: Under the circumstances, were the measures proper? It is unnecessary to recount all of the facts leading up to the assignments made by the petitioner to his wife in the taxable year. It is enough to note that they lacked the merit of reality.

The specific consideration which impelled the assignments was the community property return with which the petitioner apparently became acquainted in California. With entire frankness, the petitioner's attorney recited the genesis of the assignments and the reasons therefor. He freely stated that the equivalent of a community property status "*probably*" could be accomplished by the petitioner's making a present to his wife of a half interest in his writings—prior to the realization of income therefrom.

Thus the petitioner's primary motivating purpose—and

*Findings of Fact and Opinion.*

in fact the only purpose reflected in the record—was to divide his tax burden with his wife and so to reduce the amount of their aggregate taxes. Neither the petitioner nor his wife was present to testify as to the interest in the assignment and the circumstances surrounding it. To be effective a gift must be real. We find that no real donative intent prompted the petitioner's assignments to his wife. He attempted to utilize a pseudo gift in order to circumvent the prohibition against the filing of a community property income tax return in California by a nonresident alien. The means to accomplish this end originated with his attorney. He merely acquiesced in the method suggested and followed the routine and adopted the forms suggested by the attorney.

We observe the meticulous adherence to form which characterized the tax-avoidance efforts. Notices of the alleged gift by assignment were sent to the petitioner's literary agent—even a photostat of the "assignment" was enclosed—and remittances and reports were made on the basis of a joint ownership of the stories. Such acts are expected to be consistent with the petitioner's theory of a genuine assignment but are of no probative worth when the assignment itself is ineffective for income tax purposes. We note, however, that the notices of acceptance issued by the Curtis Publishing Company, subsequent to the alleged assignments, contained the provision that after publication the company agreed to reassign to the author, on his demand, all rights, except certain serial rights.

It is significant that notice of the alleged joint ownership of the novels, serials and stories sold to the Saturday Evening Post was not given to the publishing company, the one concern vitally interested in knowing the identity of the property owner to whom it was paying large sums of money. We conclude, therefore, that the proceeds of the novels and stories written by the petitioner and sold by his agents in 1938 are taxable to him. Since they

### *Findings of Fact and Opinion.*

amount to more than the 25 per cent prescribed in section 275 (c), that section applies to the taxable year and the statute of limitations has not tolled.

The third issue presents the taxability of lump sums paid for serial rights to literary works. This question is raised for the years 1940 and 1941 also, and will be discussed hereafter.

The fourth issue, involving the allocation of income between sums derived from sources within and without the United States, is not supported by evidence relating to the year 1937, as admitted by the petitioner's counsel, and therefore is decided in favor of the respondent.

The amounts expended by the petitioner for legal services aggregating \$753.01, are allowable deductions under the provisions of section 23 (a) (2). They were directly related to the production and collection of income, to the management of property held for the production of income, and to the preparation of the petitioner's income tax return. Regulations 103, Article 19.23 (a)-13, as amended by T. D. 5513 (May 14, 1946).

### *The Years 1940 and 1941*

#### *Issues:*

- (1) The inclusion in income of lump-sum payments for literary works;
- (2) The taxability to the petitioner or his wife of payments for serial rights to novels and other literary works of which the petitioner was the author (1940);
- (3) The inclusion in income of payments for the use of literary property outside the United States;
- (4) The disallowance of attorneys' fees.



*Findings of Fact and Opinion.*

## FINDINGS OF FACT

Under date of December 1, 1939, the petitioner executed a form of assignment to his wife of an undivided one-half interest in the manuscript entitled "Quick Service", together with a like interest in all rights thereto of every kind. The assignment was mailed to Washburn, who gave due notice thereof to the Reynolds Agency. On January 10, 1940, that Agency received the manuscript of "Quick Service" and sent it to the Curtis Publishing Company, which accepted it on January 1, 1940, and sent to the agency its check for \$40,000 in payment therefor. The memorandum of acceptance from the company was identical in form with that sent with its check for "The Cow-Creamer". The Reynolds Agency remitted to the petitioner and his wife each the sum of \$17,000, after deducting commissions and costs. The novel was published by the Saturday Evening Post from March 4, 1940 to June 22, 1940. The book rights to the novel were sold to Doubleday, Doran & Company for \$5,000.

The net paid average circulation of the Saturday Evening Post was as follows:

*Six months ending December 31, 1939:*

Within United States	3,130,396
Canada	148,163
Miscellaneous and foreign	52,230

*Six months ending June 30, 1940:*

Within United States	3,231,496
Canada	153,291
Miscellaneous and foreign	52,196

### *Findings of Fact and Opinion*

On July 23, 1941, the Reynolds Agency sold to Hearst's International-Cosmopolitan Magazine all the American and Canadian serial rights to an article entitled "My Years Behind Barbed Wire", written by the petitioner, for \$2,000.

The net paid average circulation of Hearst's International-Cosmopolitan was as follows:

*Six months ending June 30, 1941:*

Within United States	1,850,014
Canada	41,705
Miscellaneous and foreign	21,618

*Six months ending December 31, 1941:*

Within United States	1,961,600
Canada	49,436
Miscellaneous and foreign	24,164

On August 12, 1941, the Reynolds Agency sold to Curtis Publishing Company all North American (including Canadian) serial rights to "Money in the Bank," a novel written by the petitioner, for \$40,000.

The net paid average circulation of the Saturday Evening Post was as follows:

*Six months ending June 30, 1941:*

Within United States	3,328,875
Canada	121,307
Miscellaneous and foreign	43,019

*Six months ending December 31, 1941:*

Within United States	3,425,025
Canada	122,049
Miscellaneous and foreign	57,546

In 1941 the petitioner paid Washburn or his firm \$1,661.82 for legal services in connection with his handling the petitioner's literary affairs and for advice relating

*Findings of Fact and Opinion.*

to, and for the preparation of, the petitioner's income tax returns. Approximately one-half of this amount was paid for the income tax services.

OPINION

The first issue, found also in the year 1938, presents the question of the taxability of lump-sum payments for serial rights to literary works. Counsel for the petitioner concedes that substantially the same issue was raised and decided in *Sax Rohmer*, 5 T. C. 183, affirmed 153 Fed. (2d) 61, certiorari denied, 328 U. S. 862.

In *Sax Rohmer*, *supra*, we held that the lump-sum payments for serial rights were royalties and, as such, were taxable to the recipient. The arguments advanced in the cases at bar follow the same pattern as those appearing in the *Sax Rohmer* case, as presented to this Court and to the Circuit Court of Appeals. The petitioner's contentions were rejected in both courts and for the same reasons stated in the opinions therein, they are rejected here.

The facts on which the second issue is predicated are identical in character with those relating to the second issue in the year 1938. As we have there held, payments for serial rights to novels and for other literary works of the petitioner made during the taxable years, are taxable to him.

The third issue involves the inclusion in income of payments for the alleged use of literary property outside of the United States. If a specific portion of the amounts paid for serial rights are allocable and attributable to the Canadian circulation of the magazine which published the novels and articles, then such portion is not includible in the petitioner's income. (Section 119 (c) and section 211 (a) (1), (A), Internal Revenue Code.)

*Findings of Fact and Opinion.*

This question was also presented in *Sax Rohmer, supra*. There we said:

At the time the licensing agreement was settled upon, the parties apparently made no effort to segregate the value paid for the United States rights from that paid for the Canadian rights. The circulation figures do not furnish a sufficient basis upon which we could determine that any of the income was derived from sources outside the United States. Since there is no basis upon which we could properly make any allocation, it follows that the full amount must be deemed to be from sources within the United States.

See also *Estate of Alexander Marton*, 47 B. T. A. 184.

So here, there is no evidence of record disclosing that when the publishing company accepted the stories of the petitioner under the agreement indicated in the memoranda of acceptance, it and the petitioner (or the petitioner's agent), made any effort to segregate the value of the Canadian rights from the United States rights. In the cases at bar, the petitioner offered testimony showing the relative circulation of the magazines in the United States and Canada, the dates of publication of the literary productions and the opinion of the literary agent as to the value of the Canadian rights. These collateral evidential facts do not afford us a reliable basis for assigning and fixing a value, if any, to the Canadian rights. The parties to the contract were best able to make a proper allocation and segregation of the respective values. They neglected or chose not to do so. The omission, or failure, of such proof can not be corrected by a guess as to the value of a right which may have no value at all. We sustain the respondent's contention on this issue.

The fourth issue relating to attorney fees presents the same question as that involved in the fifth issue for the



*Findings of Fact and Opinion.*

year 1938. The evidence supporting the petitioner's contention relating to the taxable year is similar to that in the prior year. Therefore, as there held, the sum of \$1,661.82 is an allowable deduction for these taxable years, under the provisions of section 23 (a). (2).

*Decisions will be entered under Rule 50.*

**Respondent's Computation for Entry of Decision.**

[SAME TITLE.]

(Cert. Tr. Rec. on Review, pp. 58-64.)

The attached proposed computation is submitted, on behalf of the respondent, to The Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

The computation is submitted in accordance with the opinion of the Court, without prejudice to the respondent's right to contest the correctness of the decision entered into by the Court, pursuant to the statutes in such cases made and provided.

J. P. WENCHEL  
Chief Counsel,  
Bureau of Internal Revenue.

OF COUNSEL:

F. C. ALGIRE,  
Division Counsel,

WALT MANDRY,  
Special Attorney,

Bureau of Internal Revenue.

Without prejudice to the right of appeal as provided by law I agree that the attached computation is in accord-

*Respondent's Computation for Entry of Decision.*

ance with the opinion of The Tax Court of the United States in the above-entitled appeal.

(Sgd.) WATSON WASHBURN  
Counsel for Petitioner.

Year Ended December 31, 1938.

## ADJUSTMENT TO NET INCOME

Net income shown in deficiency letter dated July 21, 1944 \$82,929.10

Deduction:

(a) Attorney fees 753.01

Net income as corrected \$82,176.09

## EXPLANATION OF ADJUSTMENT

(a) A deduction of \$753.01 is allowed for attorney fees. (See decision of The Tax Court of the United States, page 25; (8 T.C. #72).

## COMPUTATION OF TAX

Net income as corrected \$82,176.09

Less:

Personal exemption 1,000.00

Balance (surtax net income) \$81,176.09

Less:

Earned income credit (10% of \$3,000.00) 300.00

Balance subject to normal tax \$80,876.09

Normal tax at 4% on \$80,876.09 \$ 3,235.04

Surtax on \$81,176.09 19,999.81

Interest

Liability \$3,902.60 \$23,234.85

*Respondent's Computation for Entry of Decision.*

	Interest	Tax
Previously assessed:		
Original, Acct. #995430	—	\$ 1,633.22
Additional, Acct. #3-511306,		
March 12, 1942 list	\$ 184.30	1,121.89
Additional, June 14, 1944 list,		
Spl. #1, page 0, line 4	3,848.73	12,220.86
Tax withheld at source		
Ethel Wodehouse	\$4,250.00	
Pelham G. Wodehouse	4,423.03	8,673.03
Total amount assessed and withheld	\$4,033.03	\$23,649.00
Liability	3,902.60	23,234.85
Unpaid assessment to be abated	\$ 130.43	\$ 414.15
Payments:		
Tax withheld	—	\$ 8,673.03
June 15, 1939	—	1,633.22
March 24, 1942	\$ 184.30	1,121.89
Total	\$ 184.30	\$11,428.14
Liability	3,902.60	23,234.85
Deficiency (assessed and unpaid)	\$3,718.30	\$11,806.71

Year Ended December 31, 1941

## ADJUSTMENT TO NET INCOME

Net income shown in deficiency letter dated  
 July 21, 1944 \$43,536.33

## Deduction:

(a) Attorney fees 1,661.82

Net income as corrected \$41,874.51

*Respondent's Computation for Entry of Decision.*

## EXPLANATION OF ADJUSTMENT

(a) A deduction of \$1,661.82 is allowed for attorney fees. (See decision of the Tax Court of the United States, page 30), (8 T.C. No. 72).

Net income as corrected		\$41,874.51	
Less:			
Personal exemption		750.00	
Surtax net income		\$41,124.51	
Less:			
Earned income credit (10% of \$14,000.00)		1,400.00	
Balance subject to normal tax		\$39,724.51	
Normal tax at 4% on \$39,724.51	\$ 1,588.98		
Surtax on \$41,124.51	14,555.99		
			Interest
Total tax	\$16,144.97	\$ 250.28	
Previously assessed:			
Original, Acct. #6-980213	\$ 6,841.47	\$ —	
Additional, June 14, 1944 list,			
Spl. #1, page 0; line 6	2,802.08	378.09	
Tax withheld at source thru			
Houghton Mifflin	\$ .87		
P. R. Reynolds & Son	7,342.50		
Doubleday Doran & Co.	105.28	7,448.65	—
Total amount assessed and withheld	\$17,692.20	\$ 378.09	
Liability	16,144.97	250.28	
Unpaid assessment to be abated	\$ 947.23	\$ 127.81	
Payments:			
Tax withheld	7,448.65	\$ —	
June 2, 1942	6,841.47	None	
Total	\$14,290.12	\$ None	
Liability	16,144.97	250.28	
Deficiency (assessed and unpaid)	\$ 1,854.85	\$ 250.28	



# Decision.

[SAME TITLE.]

(Cert. Tr. Rec. on Review, p. 65).

Pursuant to the Court's Findings of Fact and Opinion, promulgated March 28, 1947, the parties herein having on May 29, 1947, filed an agreed computation of tax, it is

ORDERED AND DECIDED: That there are deficiencies in income tax and penalties, as follows:

Year	Deficiency (Assessed and Unpaid)	
	Tax	Penalty
1923	\$ None	None
1924	None	None
1938	11,806.71	None
1940	8,080.83	None
1941	1,854.85	None

Enter: \_\_\_\_\_

(Signed) BOLON B. TURNER,  
Judge.

Entered Jun 10 1947

(Seal)

## Testimony.

Paul R. Reynolds—for Petitioner—Direct:

(Transcript, p. 44. \*)

By Mr. Washburn:

Q. Mr. Reynolds, your sales of these serial rights you have just testified to, included, as appears from the exhibits both Canadian and American and United States serial rights?

A. Yes.

Q. Have you any opinion as to the value of the Canadian serial rights to Mr. Wodehouse's works—to one of Mr. Wodehouse's novels in the years 1938, 1940 and 1941?

Mr. Mandry: I object to that, your Honor. Here is a sale to the Saturday Evening Post of certain rights and they purchased those rights, and the exhibits show what they purchase it for, and I don't think the witness here is qualified as to what was the value of those rights to the Saturday Evening Post or the petitioner.

The Court: The witness has not been qualified.

Mr. Washburn: Does Mr. Mandry object to his qualifications?

Mr. Mandry: Yes, on that one ground.

Mr. Washburn:

Q. Mr. Reynolds, how long have you been a literary agent?

(Transcript, p. 45.)

A. Since the fall of 1927.

\* Hereinafter, "Transcript" refers to reporter's paging of stenographic Transcript of proceedings at trial.

*Paul R. Reynolds—for Petitioner—Direct.*

Q. Have you been constantly engaged in that line of work since then?

A. Yes.

Q. How long has your firm been literary agents?

A. Since 1893.

Q. Are you familiar with the sales of stories in Canada and the United States over the period of years in which you have been in the business?

A. Yes, I am.

Q. Have you made sales yourself in behalf of authors both in Canada and the United States?

A. Yes, we made sales individually in Canada and occasionally individually in the United States, much more rarely.

Q. And frequently have you made sales together?

A. Often together but there are very few magazines in this country who will buy American rights without Canadian.

The Court: I cannot understand you.

The Witness: We often made sales of American and Canadian rights, and we have made sales of Canadian rights; and we have occasionally, but very rarely, made sales of American serial rights solely. Nearly all the American books in this country circulate in Canada and they would not buy a story unless they could buy Canadian as well as American rights, but there are today one or two who do not circulate in Canada, only here.

(Transcript, p. 46:)

By Mr. Washburn:

Q. Have you ever sold Canadian serial rights alone of an author as well known as Mr. Wodehouse?

A. No, not that I can recall. Their magazines are

*Paul R. Reynolds—for Petitioner—Direct.*

small, and wouldn't be able to pay anything like what he could get in this country, and the magazines that pay him in this country would go into Canada, and would want Canadian rights. Often, if we cannot sell a story in this country, we sell it in Canada.

Q. What is the most you have ever received for an author's book rights in Canada alone?

A. Book rights or serial?

Q. Serial rights to a book?

A. I think \$1500 is the most that I can recall.

Q. Was that for an author not so prominent as Mr. Wodehouse?

A. Nowhere near.

(Transcript, p. 48.)

By Mr. Washburn:

Q. Mr. Reynolds, what was your arrangement for compensation with Mr. and Mrs. Wodehouse during these years?

A. We received a commission.

Mr. Mandry: Was your arrangement a written agreement?

The Witness: No.

The Court: Proceed.

By Mr. Washburn:

Q. You may answer, Mr. Reynolds.

A. We didn't have any written agreements.

Q. You may answer my question now.

(The question and answer were read.)

*Paul R. Reynolds—for Petitioner—Direct.*

By Mr. Washburn:

Q. What was the amount?

A. Five per cent.

Q. What was the arrangement for handling the funds which you received from the Saturday Evening Post?

A. We collected the money, took our commission, retained any other charges, withheld the non-resident alien income tax and paid the proceeds to Mr. Wodehouse or to Mr. and Mrs., if the story was assigned to Mrs.

Q. Did you put the proceeds in your general checking account first?

(Transcript, p. 49.)

A. In our business account.

Q. Did you make the contract on their behalf directly with the Saturday Evening Post?

A. Yes. I don't know whether you would call it a contract legally.

Q. Well, the arrangement for sale.

A. Yes. I say I did, I did in most cases.

Q. I am speaking of the cases you testified to this afternoon, in 1938, 1940 and 1941?

A. My father was then alive. I may have talked it over with him, but at that time I was doing most of the work. My father may have spoken to an editor, but only the two of us.

Mr. Washburn: I would ask your Honor's permission to recall Mr. Reynolds to testify on the Canadian allocation after the proof of the circulation is offered.

The Court: Any cross-examination.



*Paul R. Reynolds—for Petitioner—Cross.*

Cross Examination by Mr. Mandry:

Q. Mr. Reynolds, I believe you said your firm had been agents for the petitioner since before the First World War?

A. Whether it was before or during—

Q. Approximately that time?

A. Yes.

(Transcript, p. 50.)

Q. And the Paul R. Reynolds & Son Agency—is that your name for the agency?

A. Yes.

Q. It is not a corporation?

A. No.

Q. And during the time that your father was alive, you were associated with him in that agency?

A. We were partners.

Q. And I assume during that time you have sold a great number of stories for the petitioner?

A. Yes.

Q. The petitioner was a well-known writer of stories?

A. Very.

Q. And had quite a wide reputation in the United States as a writer?

A. That is correct.

Q. And to what magazine did you usually sell his stories?

A. These stories were to the Post. Before that for quite a while to Collier's, and there was a period before that around 1928, as I remember it, it was to Liberty. Before that, again to the Post. There was one contract with the American, I think, in the early 30's.

Q. Was there a wide demand for his stories?

A. Yes, there were only three or four places that you

*Paul R. Reynolds—for Petitioner—Cross.*

could sell them, but they were very valuable to those places.

(Transcript, p. 51.)

Q. And you had very little difficulty in placing them with those outlets?

A. The great question was price.

Q. Mainly the question of a proper price?

A. Yes.

Q. Who wrote all of the stories that you sold under the name of Pelham G. Wodehouse?

A. Mr. Wodehouse.

Q. Was he assisted in the writing field by his wife?

A. Not that I know of.

Q. Did you ever sell any stories written by Mrs. Pelham G. Wodehouse?

A. No.

Q. With reference to the story, "The Cow Creamer," when did you receive that story from Mr. Wodehouse for sale?

Mr. Washburn: I was just going to suggest, I don't think it is in evidence that Mr. Reynolds received anything from Mr. Wodehouse for sale, but from Mr. and Mrs. Wodehouse for sale.

By Mr. Mandry:

Q. Do your records show from whom you received the manuscript, "The Cow Creamer"?

(Transcript, p. 52.)

A. I can say that I think we received it from Mr. Wodehouse. We kept no records of the date of receipt. We would have a record today of the date it went to the Post.

*Paul R. Reynolds—for Petitioner—Cross.*

Q. You have no correspondence showing the transmission of that story to you?

A. Whatever correspondence I have with Wodehouse is very, very slim. Wodehouse is not a person to write letters. Roughly what would happen: We would receive the story and we would read it right away, and when he was writing for the Post it would immediately go to the Post. I would say we received it within a week before it went to the Post and the Post practically always decides within a week, and I would have a card of the date it went to the Post, but I would have no record of the day we received it unless there was a record from Wodehouse with it.

Q. Manuscripts which you received as a literary agent were ordinarily accompanied by a letter of transmission, were they not?

A. Yes, that probably came separate from the letter. I am trying to guess, you understand, this is eight years ago.

Q. If there had been such a letter, you would have kept it?

A. I should think so.

(Transcript, p. 53)

Q. You haven't destroyed any of your files, have you?

A. No, but Wodehouse's file had been mauled over and mauled over and there were very few letters from him. The letters covering these years we have got here. There were some letters in the exhibits.

Q. Do you have a letter of transmittal of "The Cow Creamer" manuscript?

A. Is that in with "The Cow Creamer" exhibit?

Here is a letter to Wodehouse about "The Silver Cow" written by my father. It says, "I read the whole of 'The Silver Cow.'" That letter was written by my father after he received the story.

*Paul R. Reynolds—for Petitioner—Cross.*

Q. Then, according to your files it showed that your office received the manuscript, "The Silver Cow" not later than February 8th, 1938?

A. Yes, the first serial rights are the most valuable that you try to sell. We have a card for each story, and that has the date it went to the Post on. The notes are pretty complete.

Q. And this letter of February 8th, 1938, written by your father was addressed to Pelham G. Wodehouse?

A. That is right.

Q. Would that indicate to you that the story was received from Pelham G. Wodehouse?

A. I think the stories would have been sent by him.

(Transcript, p. 54.)

Q. Now, that story was sent by Mr. Wodehouse somewhere in England or France?

A. France.

Q. And it would have taken a week or so, probably to have gotten here?

A. Probably.

Q. Do your records show when you first opened negotiations for the sale of "The Silver Cow"?

A. The way the thing works is, long before the story is written, as a rule, we sell a story to the Post, and we would talk to them about the next story orally. The editor of the Post comes into our office every week and more than once I would go to Philadelphia and talk to the chief himself, and he tells me how he feels, what he thinks he can pay for the next story, and it is a sort of an oral arrangement. I don't know exactly what you are getting at.

Q. I am merely asking what your records show.

A. Our record shows—I can bring in tomorrow—maybe I should have— When we offer the story to the Post there

*Paul R. Reynolds—for Petitioner—Cross.*

is a card with the date—the author and the date the story went to the magazine; and if it is sold, it is marked sold and filed, and a new card made for the book rights and another for the picture rights; and if it isn't sold to the Post, it is marked rejected, and if we offer it to another magazine it is marked—

(Transcript, p. 55.)

Q. Will you bring these cards in tomorrow?

A. I will. If it is a question of price, I have brought the books also, our books.

Q. Can you state from your records the date upon which this story, "The Silver Cow" was sold to the Curtis Publishing Company?

A. Yes, our books would show the date. They usually would phone, and we probably marked the date on the card. The Post always pays, checks go out Tuesday after they buy a story, and with the check comes that. That we received on Wednesday, I think. If you will look it up you will find that date is Tuesday, February 22nd.

Q. This letter of February 22nd, 1938, which is one of the sheets attached and included in Exhibit 4. Then the story was purchased by the Curtis Publishing Company sometime prior to February 22nd, 1938?

A. Yes.

Q. And those card records will show definitely those dates?

A. It would not be more than a week before.

Q. And you stated, I believe, that usually those sales were as a result of conferences between you and members of the Curtis Publishing Company?

A. That is right.

(Transcript, p. 56.)

Q. Do you recall any difficulty in making the sale of "The Cow Creamer"?

A. I don't recall specifically. As I remember his price



*Paul R. Reynolds—for Petitioner—Cross.*

was settled at forty. In earlier periods we got as much as fifty. That is the most I think we ever got.

Q. You mentioned the fact that you sometimes discussed matters with the publishers prior to the receipt of the manuscripts?

A. Yes.

Q. Was that because you were informed a writer was writing a certain story or you anticipated that he would have a certain amount of stories produced?

A. My father handled Wodehouse for a long period of years. He made his living by his writing, and we wouldn't write a letter agreeing to deliver a story, but we wanted to know if they wanted to go on with Wodehouse or whether they were tired of him and didn't want any more Wodehouse. And, of course, we were selling them stories by other authors at the same time.

Q. And your usual method of sales of Wodehouse stories, it was a question of discussion, and then would the Curtis Publishing Company call you up and say, "We will take the story," and then it is a question of deciding on the price?

A. Yes, sometimes the price would have been agreed upon in advance, and we knew they were going to buy the story unless for some reason Wodehouse wrote a very poor story, in their opinion.

(Transcript, p. 57.)

You were asking about letters from Wodehouse. He wrote very few. As I remember it, in France he had a secretary—

Q. Exhibit 5 refers to the manuscript "Uncle Fred in the Springtime," and assignment dated September 1, 1938. Does your file indicate from whom you received that manuscript?

A. I doubt it. This I am somewhat guessing, but it

*Paul R. Reynolds—for Petitioner—Cross.*

is our custom—let us say—that purely form letters we destroyed. Wodehouse had a secretary in France and the secretary would say, "I am sending under separate cover such and such," a letter that we could not keep. Any letter that said anything we would have kept. I could not say accurately. You asked me if Wodehouse sent the story, and I said he did, and if you asked me again, I would say his secretary did, but it came from him. And he and his wife were living at that time in France.

Q.: One sheet of Exhibit 8 shows that Curtis Publishing Company sent you a check on December 13th, 1938, for "Uncle Fred in the Springtime," does it not?

A. Correct.

Q. Do your records show when you commenced negotiations for the sale of that story?

(Transcript, p. 57-a.)

A. It would show the date the manuscript went off to Philadelphia, not necessarily showing anything else.

Q. But your testimony with respect to the method of handling the story, "The Cow Creamer," is applicable to the handling of this story generally?

A. Yes; the editor comes in every Thursday. If I had it Tuesday or Wednesday, I would give him if Thursday. He would read it on the train. But even then that would be entered on the card, the date he got it.

Q. The sale of the story "Quick Service," in 1940, Exhibit 6, refers to assignment dated December 1, 1939. Exhibit 7 with reference to that story shows that Curtis Publishing Company sent you a check on January 16th, 1940, for that story. Is your testimony with respect to handling the other two stories applicable to this story in general?

A. Yes, so far as I know.

*Paul R. Reynolds for Petitioner—Cross.*

Q. And I understand you will have cards here to-morrow showing certain information regarding all three stories?

A. Correct.

Q. You testified on direct examination that you had no written contract with Mr. Wodehouse or Mrs. Wodehouse for the disposition of these stories in 1938 and 1940. What kind of arrangements had you had with Mr. Wodehouse prior to 1938 for the sale of his stories?

(Transcript, p. 58.)

A. We don't have contracts with any of our clients.

Q. You have some arrangement?

A. When I say contracts, no written contracts. A writer agrees to give me his work. I go ahead and try to place it. I don't make a sale without consulting him unless I know him and know the situation and know he will be pleased and satisfied.

Q. I take it then you had an oral understanding with Mr. Wodehouse prior to 1938 for the sale of his stories and for a certain commission fee for you for the payment of services?

A. That is correct.

Q. What happened commencing on January 1, 1938, regarding the disposition of stories written by Mr. Wodehouse?

A. I don't know what you mean. I don't know why the significance of the date.

Q. Did you receive any other instructions regarding the disposition of his stories other than you had with Mr. Wodehouse prior to January 1, 1938?

A. We received assignments. You are referring to the assignments to Mrs. Wodehouse?

Q. I am asking you whether you had instructions re-

*Paul R. Reynolds—for Petitioner—Cross.*

garding your arrangements for the sale of Mr. Wodehouse's literary products?

A. No, unless the receipt of assignments you consider as a direction.

(Transcript, p. 59.)

Q. When did you last see Mr. Wodehouse prior to January 1st, 1938, if you can recall that far back?

A. I saw him in Hollywood, but I couldn't tell you the year. I think it was before 1938.

Q. He was in Hollywood in 1936, wasn't he?

A. I would have to look up my records in my office and see if I can find a clue.

Q. Do you recall whether he was in Hollywood—

A. I know I saw him in Hollywood; I remember I had tea with him and his wife, but the date I cannot recall now.

Q. If I said the year 1937, would that refresh your memory at all?

A. I don't remember, but I may be able to—if I can look up my office and correspondence to find out when he was in Hollywood, then I could find out when I was out there, but I cannot remember now.

Q. Do you recall whether it was prior to 1938?

A. I think I saw him in Hollywood prior to 1938.

Q. Have you seen him since that time when you saw him in Hollywood?

A. I think that was the last time I saw him. I have only seen him myself maybe half a dozen times.

Q. Did you see Mrs. Wodehouse since January 1, 1938?

(Transcript, p. 60.)

A. I don't think so, but I don't like to be certain.

**Watson Washburn—for Petitioner—Direct:**

(Transcript, p. 68.)

Q. What happened to Mr. Wodehouse's income tax situation after the settlement was effected in 1936?

(Transcript, p. 69.)

A. Mr. Wodehouse came to us in the fall of 1936 with his wife. He had made a contract to work out at Hollywood. He and his wife saw me here on their way through to Hollywood, and Mr. Malone, we both saw them. He had filed returns for 1934, 1935,—up to that time (when they were due on June 15th of each year. While he was going through here he consulted us regarding, or he told us that he had made this contract at Hollywood for which he was to receive a substantial salary, I think at about the rate of fifty or seventy-five thousand dollars a year, for some months, six months or more. And my recollection is that he showed me then a contract which he had made with Siva a couple of years before, and he didn't know whether his salary from Hollywood should be paid over to Siva or whether it belonged to him individually.

My recollection is that I told him that it wouldn't make any difference so far as I could see to the income tax situation of either himself or Siva, because it was my opinion that the salary, his personal salary for services, would be taxed to him personally anyway, regardless of any assignment of the right to his personal services.

He and Mrs. Wodehouse went out to Hollywood then and stayed out there for nearly a year. I think they got another short contract from another motion picture company. While he was there his agent, whose name was Stevens, was representing him on a commission basis. Mr. and Mrs. Wodehouse returned here the following year.



*Watson Washburn—for Petitioner—Direct.*

(Transcript, p. 70.)

In the meantime they had written to me that in connection with their income tax return for the year 1936, which had to be filed while they were in Hollywood, they had been told they should report their income on a community property basis, that being the California law.

I advised them, if my recollection is correct—they said they had come in under a quota visé which they thought made them residents—I told them that in my opinion, since they were only in Hollywood for business, it was doubtful whether they were residents there or domiciled there for community property purposes, but if, as I had assumed, they were residents of France, I believed that the French law as to community property was the same as California; so that I think their original returns for that year were prepared on a community property basis.

When they came back here in the fall of 1937, they came to see me again and they raised the question of their community property position, and chiefly of their residence or domicile. I told them that I didn't think—that they should really consult their counsel in England where they certainly had originally been domiciled and possibly in France before I could give them very much help, although I tried to explain to them the various elements of the domicile or residence.

(Transcript, p. 71.)

They then told me that they had never had any—I believe I asked them whether they had any special arrangement whereby they were not to have community property because I said that even in community property jurisdictions—I understood if the parties had a contrary agreement that law didn't apply, and they said they had no such agreement, and that actually they had a joint

*Watson Washburn—for Petitioner—Direct.*

account, usually, and had no objection whatever to an equal sharing of their worldly gains.

I believe I then told them that if that was the case, that assuming that the community property—assuming that they were not domiciled in a community property jurisdiction that in my opinion if the petitioner wished to give his wife half of whatever he might have of his property that he probably could achieve the same result as the community property jurisdiction by making a present to her of a half interest in his writings, if he did so before any income was realized from them.

He said that was perfectly agreeable to him, and he suggested, as I recall it, that after he got back to Europe and had a chance to consult with his counsel there, that I should prepare and send him a form of assignment that would cover the matter which we discussed.

(Transcript, p. 72.)

Q. What was the next you heard from the petitioner?

A. The next that I recall having heard from him was, or from his wife—one or the other would write to me, sometimes one and sometimes the other—that their English barrister had told them that they were certainly not residents of France, or at least, certainly not domiciled in France, but were domiciled in England.

Q. Did you, on receipt of that information, make any change—what did you do about their income tax returns previously filed on a community property basis?

A. I prepared amended returns on a separate property basis in which Mr. Wodehouse reported all the income from his Hollywood contracts himself and Mrs. Wodehouse none.

Q. What was done regarding the payment of the taxes?

A. Mr. Wodehouse paid whatever additional tax was required, as I recall, and Mrs. Wodehouse applied for a

*Watson Washburn—for Petitioner—Direct.*

refund of the tax which she paid under one-half of the salary.

Q. Did you receive any assignments from Mr. Wodehouse thereafter of an interest in his writings, in any of his writings to his wife?

A. I did. I received the assignments which were referred to in the testimony of Mr. Reynolds earlier this afternoon.

Q. When did you receive those assignments and what did you do with them?

(Transcript, p. 73.)

A. I received on January 12th, 1938, a letter dated January 3rd, 1938, from Mrs. Wodehouse, enclosing an original assignment which I would like to offer in evidence. Petitioner's Exhibit 1 is what I received on January 12th, 1938.

Q. What did you do upon the receipt of that assignment?

A. I sent it to Mr. Reynolds with a letter, a copy of which is Petitioner's Exhibit 2.

Q. Did you receive any further assignments from Mr. Wodehouse to his wife?

A. On October 15th, 1938, I received an assignment signed by Mr. Wodehouse, and also signed by Ethel Wodehouse, in the form of an agreement, assigning a one-half interest to Mrs. Wodehouse in Mr. Wodehouse's work, "Uncle Fred in the Springtime."

I would like to offer this in evidence.

Mr. Mandry: No objection.

The Court: Petitioner's Exhibit 9.

(Agreement of 9/1/38 was received in evidence and marked Petitioner's Exhibit 9.)

*Watson Washburn—for Petitioner—Direct.*

By Mr. Washburn:

Q. Did you take any action upon receipt of that assignment?

(Transcript, p. 74.)

A. I wrote to Mr. Reynolds the original letter of which Exhibit 5 has been received in evidence.

Q. Did you receive any further assignments from Mr. Wodehouse to Mrs. Wodehouse of literary rights in the year 1940?

A. I received on January 2nd, 1940, a letter from Mr. Wodehouse dated December 1, 1939, enclosing an assignment of a half share in his new novel "Quick Service" to his wife.

Q. What did you do upon the receipt of that assignment?

A. I wrote to Mr. Reynolds the letter of which a copy was admitted in evidence as Petitioner's Exhibit 6.

Q. Did you send copies of your letters to Mr. Reynolds, the last three copies to which you have testified, to any other persons?

A. I sent to Mrs. Wodehouse a copy of my letter of January 12th, 1938, to Mr. Reynolds, Petitioner's Exhibit 2, and I sent to Mr. Wodehouse a copy of my letter of January 2nd, 1940, to Mr. Reynolds, Petitioner's Exhibit 6.

Q. Have you a copy or the original assignment of December 31st, 1939?

A. I do not seem to find it among these papers, but I will try and locate it by tomorrow morning and produce it then.

**Watson Washburn—for Petitioner—Cross:**

(Transcript, p. 91.)

Q. When Mr. Wodehouse and his wife came to the United States in 1936 and went to Hollywood, you stated that they filed their return on the community property basis?

A. That is to the best of my knowledge, the original return.

Q. And it was subsequent to the due date that the amended returns were filed for each one?

A. I think that is correct.

Q. Did you prepare those amended returns?

(Transcript, p. 92.)

A. I think so.

Q. It was following that discussion with Mr. Wodehouse with respect to the division of the income on the community property basis that you advised him the same result could be accomplished by executing an assignment to his wife?

A. I think it was a year later. It was the following year when he was coming back from California with his wife.

Q. In the year 1937?

A. Toward the end of 1937.

Q. And you prepared a form of assignment?

A. Yes.

Q. Was that merely a draft to be used or an actual form to be executed by the petitioner?

A. I think it was a perfectly valid assignment.

Q. I am not asking you that. I am asking you about the preparation of the assignment.

A. Are you asking me whether the assignments which had been offered in evidence had been typed in my office or drafted by me?



*Watson Washburn—for Petitioner—Cross.*

Q. Yes.

A. May I look at them? I think that the assignment dated January 3rd, 1938 was drafted by me. The assignment dated—that is Exhibit 1—the assignment dated September 1st, 1938, wasn't drafted by me. Those seem to be the only two that I find here. One was drafted by me and one was not.

(Transcript, p. 93.)

Q. Did Mr. Wodehouse pursue this method of making assignments to his wife during the year 1939?

A. He did, to some extent, at least. He may have assigned a half interest in three or four stories to his wife in 1939.

Q. In your discussions with Mr. Wodehouse in 1937, you said that he told you that he and Mrs. Wodehouse had a joint bank account, is that true?

A. That is true.

Q. And that all of their worldly property belonged equally to each?

A. I won't say that he phrased it in quite that language. He said he had no objection to giving her half his worldly goods, or words, substantially so.

Q. My recollection is of your testimony that Mr. Wodehouse said that there was an equal sharing of worldly gains?

A. He said as a practical matter he and his wife were a very united couple, and he didn't mind her having a half interest in everything he had. That is my best recollection. As a matter of fact, he didn't know whether she already had a half interest in all his gains, because he didn't know whether he was under a community property jurisdiction or not.

*Watson Washburn—for Petitioner—Cross.*

(Transcript, p. 94.)

Q. You are speaking of the time he was in California?

A. The time he talked with me in 1937, with Mrs. Wodehouse.

Q. He was merely concerned then with respect to his taxable income during the year 1936, was he not, as to whether it should be reported on a community basis?

A. He was in doubt as to whether he was on a community basis or not, because he didn't know where he was legally domiciled or resident.

Q. But that would not affect his tax liability for the years after 1937, when he was returning to England?

A. He was returning to France and France has a community property law unless the parties agree otherwise, I so thought at the time; and it is still my opinion.

Q. He had lived in France for many years prior to 1936, had he not?

A. Yes.

Q. In your handling of his tax cases from 1925 to 1933 you didn't contend that he was under the community property basis while he was a resident of France, did you?

A. I am not sure they lived in France as early as 1933. He was living there immediately before 1936. He came over here from France, but the point had never come to my attention in the course of the 1925 to 1932 controversy.

**Paul R. Reynolds—for Petitioner—Recalled—Direct:**

(Transcript, p. 105.)

**PAUL R. REYNOLDS,**

recalled, further testified as follows:

The Court: The oath that you have taken obtains throughout the hearing.

Direct examination by Mr. Washburn:

Q. Mr. Reynolds, have you found the original letters from my firm that you referred to in your testimony yesterday, dated December 1, 1938?

A. I don't know whether I found them all.

(Transcript, p. 106.)

Q. Will you produce them?

A. Yes.

Mr. Washburn: This is the original letter dated January 12, 1938. May I suggest that I show them to Mr. Mandry, and if he is satisfied the copies will be let in?

The Court: The copies have already been marked and so there is no need for these.

(Transcript, p. 107.)

The Court: Do you have any questions?

Mr. Mandry: No.

The Witness: Don't you want me to answer the questions I couldn't answer yesterday?

Mr. Mandry: He did say he would bring back some cards as to 1938 and 1940.

The Witness: Yes, and correspondence which would determine more accurately the dates of delivery. These are the three stories. I said it was from his secretary.

*Paul R. Reynolds—for Petitioner—Recalled—Cross.*

(Transcript, p. 108.)

Cross examination by Mr. Mandry:

Q. Suppose we start out with "The Cow Creamer", in 1938 what does your card show with respect to that?

A. The card shows part of the story delivered to the Post October 22nd, and the balance of the story was delivered February 5th, the next year, sold February 19th, and we were paid February 23, 1938.

Q. With respect to the disposition of the funds which are set forth in Exhibit 4, I notice there is a check made out to the Bank of Manhattan Company for \$34,200, signed by you. What was that check for?

A. That was in payment for a serial, "The Silver Cow" less income tax withheld and commission, and probably other charges.

Q. Just tell me the history of that. It says payable to the order of the Bank of Manhattan Company.

A. We wrote a letter to the Bank and enclosed this check, and asked them to send a draft to Mr. Wodehouse and to Mrs. Wodehouse.

Q. With respect to "Uncle Fred in the Springtime," in 1938, what do your cards now show with respect to that?

A. Part of the story was received in September 1938 or offered to the Post in September 1938, and the conclusion in October, and then he had to do some revision. They wanted some changes in the story. They received the balance of the story December 6th, and bought it December 31st. If the dates of delivery are important to you—

(Transcript, p. 109.)

Q. What do you mean, the dates of delivery?

A. These cards show the dates we offered them to the Post, and you were quizzing me yesterday as to whether our office received it.

Q. That is right.

*Paul R. Reynolds—for Petitioner—Recalled—Cross.*

A. This is a note from a typewriting bureau in London. It says, "Sent on the instructions of Mr. P. G. Wodehouse."

Q. What is that date?

A. September 6th, 1938.

Q. What story does it relate to?

A. In my father's handwriting it was "Uncle Fred in the Springtime."

Q. It would have been received, perhaps in installments?

A. Yes, in three installments.

Q. With respect to "Quick Service," in 1940, what do your cards show about that?

A. "Quick Service" went to the Post on January 11th, 1940, sold to the Post January 16th, 1940, paid for January 17th, 1940.

Q. Do you have any other record with respect to that story showing when you received it from the petitioner?

(Transcript, p. 110.)

A. I brought over all the correspondence of 1937 and 1938, but for 1940, I probably have the same as the others. Wodehouse is an important client, and we read the story over immediately, and it went immediately to the Post, and no one else. In other words, we received it approximately January 10th.

Q. With respect to all three of those stories, who took out the copyrights on them?

A. Saturday Evening Post.

Q. Does the usual contract for the sale of these stories to the Saturday Evening Post—is there an agreement that they will retransfer the copyrights back?

A. The copies of the agreement with the Post I think are in the exhibits. They agreed to assign the rights, and I believe the lawyers disagree as to whether it is a valid assignment of copyright.

Q. But that is what they do?

A. Yes, after they use the story they assign all the rights except the rights they retain.



*Paul R. Reynolds—for Petitioner—Recalled—Cross.*

Q. Do your records show as to whether the Curtis Publishing Company ever assigned the copyrights back?

A. Yes, and we would have them—

Mr. Washburn: I think the Post's contracts are in evidence, and therefore this testimony is unnecessary, and I, therefore, object to it, and move to strike out anything the witness may have said as to the legal effect of the agreement which is in evidence.

(Transcript, p. 111.)

Mr. Mandry: The evidence is in there, but I also asked him as to who took out the copyrights.

The Witness: The Curtis Publishing Company.

By Mr. Mandry: .

Q. Did the Curtis Publishing Company assign those copyrights to anyone else?

A. No, they would assign them to no one but the author.

Q. Did they do that?

A. Whenever we asked them to, and I would have to check in each individual case whether we asked them to.

Q. Do you have your records here that would show that?

A. No. I have seen one assignment of copyright. It is a regular form, and the custom in the magazine business is to universally re-assign the rights after the magazine has exercised them. I think, Mr. Washburn, it was in the papers I had yesterday. He wanted to see a reassignment of the right of a story purchased by the Post. It may be in these papers, but you could show the assignments.

By Mr. Mandry:

Q. Could you show me assignments with respect to these three stories?

*Paul R. Reynolds—for Petitioner—Recalled—Cross.*

Mr. Washburn: What is the purpose of this?

(Transcript, p. 112.)

Mr. Mandry: The purpose of it is that we have here an alleged assignment by the petitioner to his wife with respect to all the property rights in the literary products after it is sold to a magazine with the right in the contract for reassignment of copyright to the author, and I want to find out where those copyrights finally ended up. Unfortunately the witness does not seem to have any records with him.

The Witness: If you would have let me know what you wanted in advance, I feel sure that there were assignments in all three, and we have them.

By Mr. Mandry:

Q. Whom do you think they were made to?

A. They are always made to the author.

\* \* \*

*Paul R. Reynolds—for Petitioner—Recalled—Direct.*

(Transcript, p. 119)

\* \* \*

By Mr. Washburn:

Q. Mr. Reynolds, approximately when were the three long novels written by Mr. Wodehouse, which you have testified to here in the last two days? Were they published shortly after you made the contracts for them?

A. Yes, I think within six months. I think it is shown in the cards.

*Paul R. Reynolds—for Petitioner—Recalled—Direct.*

Q. All right, tell us when they were published.

A. Uncle Fred in the Springtime, April 22nd to May 27th.

The Court: What year?

The Witness: 1939. The Silver Cow, July 9th, 1939, to September 3rd, 1939. Quick Service, March 4th, 1940, to June 22nd, 1940.

By Mr. Washburn:

Q. And the short story published in Cosmopolitan, was that published shortly after you sold it?

A. I think so.

Q. That is the story referred to in this letter, contract of July 23rd, 1941, which I now hand you?

A. Yes.

(Transcript, p. 120.)

Mr. Washburn: I offer it in evidence.

Mr. Mandry: No objection.

The Court: Petitioner's Exhibit 15.

(Letter, 7/23/41, was marked as Petitioner's Exhibit 15 and received in evidence.)

By Mr. Washburn:

Q. I hand you a paper which purports to be the contract with the Saturday Evening Post, for Money in the Bank, dated August 12th, 1941. Is that the original of that paper?

A. Yes.

Mr. Washburn: I offer it in evidence.

Mr. Mandry: No objection.

The Court: Petitioner's Exhibit 16.

*Paul R. Reynolds—for Petitioner—Recalled—Direct.*

(Contract, 8/12/41, was marked as Petitioner's Exhibit 16 and received in evidence.)

By Mr. Washburn:

Q. Mr. Reynolds, you heard the testimony of the gentleman from the circulation magazine. Are you familiar with that magazine?

A. Liberty?

Q. No, the magazine which gives circulation figures.

A. Very generally, I have heard of it.

Q. Standard Rate and Data Service it is called. Assuming, Mr. Reynolds, that the circulation of the Saturday Evening Post in the United States was approximately 94 per cent of its total circulation and that its circulation outside of the United States was approximately 6 per cent, in your opinion, would the approximate value of the rights outside the United States bear that same relation, the first serial rights, to the rights within the United States?

(Transcript, p. 121.)

Mr. Mandry: I object, your Honor. In the first place, the contracts are for the purchase of the rights, without any allocation at all. And if the parties could not allocate as to their contract then it cannot be done by this method. Second, that the witness is not qualified.

He testified he is his literary agent and sold stories; and yesterday he also testified, as I recall it, that while he had sold to a few magazines in Canada, he had not sold the same stories separately in the United States and in Canada. That was my recollection of his testimony, and I don't think he is qualified to testify as to the value to the Curtis Publishing Company as to the stories they purchased from the petitioner.

*Paul R. Reynolds—for Petitioner—Recalled—Direct.*

Mr. Washburn: In the first place, he testified yesterday that no one sold the same story to the two countries separately.

The Court: He may answer.

(Transcript, p. 122.)

The Witness: Except in very rare circumstances.

By Mr. Washburn:

Q. You may answer the original question.

A. Can you read it to me?

(Question read.)

The Witness: If you mean could we have sold a Wodehouse story in Canada if we had been unable to sell it in the United States, yes, we could have.

By Mr. Washburn:

Q. I didn't quite hear that.

A. If I had a new Wodehouse story, could I have sold it in Canada or could I have seven years ago; yes, I could have. I have an idea about the maximum I could get.

Q. I don't think that is an answer to my question.

The Court: I believe the witness has—

Mr. Washburn: May I rephrase it?

The Court: You may rephrase it.

By Mr. Washburn:

Q. Mr. Reynolds, assuming that the rights—that the Saturday Evening Post has a circulation outside the



*Paul R. Reynolds—for Petitioner—Recalled—Direct.*

United States of approximately 6 per cent of its total circulation. In your opinion, is the value of the rights of the *Saturday Evening Post*, in a serial novel of P. G. Wodehouse, equal to approximately 6 per cent of the total price which it is worth to the *Saturday Evening Post*?

(Transcript, p. 123.)

A. I suppose so. The *Post* would not have bought it without the Canadian rights. They wouldn't, because they couldn't keep their magazine out of Canada. As to the value, that would seem to be up to you lawyers. It's certainly a value.

Q. Have you any opinion about it as an expert literary agent?

A. I can tell you the maximum that I think the Canadian magazine would have paid.

Q. What would a Canadian magazine have paid for the Wodehouse serial rights?

A. The most leading magazine in Canada, the most, the editor told me, he ever paid was \$2,000 as a maximum. The most I have ever sold to a Canadian magazine was \$1500.

Q. Has any author of as good value as P. G. Wodehouse been sold to a Canadian magazine without including the United States?

A. No.

Mr. Mandry: No questions.

The Court: You are excused.

# **Petitioner's Exhibit 1.**

(Cert. Tr. Rec. on Rev., p. 124.)

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, PELHAM G. WODEHOUSE, being the author of a certain original unpublished novel in manuscript, consisting of            typewritten pages, entitled "The Cow-Creamer", does hereby assign, transfer and set over unto his wife, ETHEL WODEHOUSE, an undivided one-half interest in all his literary property, right, title and interest in and to said manuscript, including all profits that may arise from copyrighting the same throughout the world and from printing, publishing and selling the same in serial or book form and in newspapers and magazines, including all dramatic, radio, motion picture, either silent or talking, and television rights of every nature and description throughout the world, said undivided one-half interest to be hers in perpetuity.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 3rd day of January, 1938.

P. G. WODEHOUSE (L. S.)

Witnesses:

ILLEGIBLE

Lloyds & National Provincial Foreign Bank Limited  
59, Rue St. Jean, LE TOUQUET PARIS PLAGE  
Bank Manager

## Petitioner's Exhibit 2.

(Cert. Tr. Rec. on Rev., p. 125.)

PERKINS, MALONE & WASHBURN  
ATTORNEYS AT LAW

Bar Building—36 West 44th Street

New York, January 12, 1938.

Mr. Paul R. Reynolds, Jr.,  
599 Fifth Avenue,  
New York, N. Y.

Dear Mr. Reynolds:

I received a letter from Siva, dated December 31, 1937, stating that "Siva has transferred back to Mr. P. G. Wodehouse all his copyrights."

I also received this morning from Mr. Wodehouse an assignment from him to Mrs. Wodehouse of an undivided one-half interest in all his literary rights in his new novel, "The Cow-Creamer".

Accordingly, payments on all Mr. Wodehouse's writings, except "The Cow-Creamer", should be made to Mr. Wodehouse, beginning January 1, 1938; and any contracts which you make, or payments which you receive relating to "The Cow-Creamer" must be made for the joint benefit of Mr. and Mrs. Wodehouse.

Sincerely yours,

WATSON WASHBURN.

WW:OL

**Petitioner's Exhibit 3.**

(Cert. Tr. Rec. on Rev., p. 126.)

**PERKINS, MALONE & WASHBURN**  
ATTORNEYS AT LAW

Bar Building—36 West 44th Street

New York, February 24, 1938.

Mr. Paul R. Reynolds, Jr.,  
599 Fifth Avenue,  
New York, N. Y.

Re: P. G. Wodehouse

Dear Mr. Reynolds:

I enclose for your information and files photostat of the assignment from Mr. P. G. Wodehouse to Mrs. Wodehouse of a one-half interest in "The Cow-Creamer", the name of which, I understand, has been changed to "The Silver Cow".

Very truly yours,

H. MALONE

HM:OL  
Enclosure

**Petitioner's Exhibit 4.**

(Cert. Tr. Rec. on Rev., pp. 127, 128, 129.)

**THE CURTIS PUBLISHING COMPANY**

INDEPENDENCE SQUARE

PHILADELPHIA

February 22, 1938

Paul R. Reynolds, & Son  
599 Fifth Avenue  
New York City

We inclose herewith  
our check Forty Thousand Dollars

in payment for.

Serial: The Silver Cow

By P. G. Wodehouse

\$40,000.00

**IMPORTANT**

This check is offered and accepted with the understanding that The Curtis Publishing Company buys all rights in and of all stories and special articles appearing in its publications and with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.

**MOTION PICTURE RIGHTS**

Please note that our reservation of serial rights (which includes publication in one installment) includes new story versions based on motion-picture or dramatic scenarios of short stories and serials that have appeared in Curtis publications, and that we permit the use of such versions



*Petitioner's Exhibit 4.*

only under the following conditions: Such synopsis, scenario, or new story version shall not exceed fifteen hundred (1500) words in length when based on a short story appearing complete in one issue, or five thousand (5000) words when based on a serial appearing in two or more issues, or a series of not less than three connected short stories from which a single picture is to be made. Such synopsis shall appear only in circular matter, press books, press notices, trade journals and in magazines devoted exclusively to dramatic or motion-picture matter, and shall in no event appear as having been written by the author. When selling motion-picture or dramatic rights of matter, you must notify the producer to this effect, so that there may be no misunderstanding on his part and no infringement of our rights.

THE CURTIS PUBLISHING COMPANY

52

PAUL R. REYNOLDS & SON

599 Fifth Avenue

New York March 1, 1938 No. 16973

Pay to the order of Bank of the Manhattan Co.  
\$34,200 00/100 exactly Thirty-four Thousand Two Hundred  
Dollars no cents exactly Dollars.

PAUL R. REYNOLDS, JR.

B

Chartered 1799

BANK OF THE MANHATTAN COMPANY  
Madison Avenue at 43rd Street  
New York

R

*Petitioner's Exhibit 4.*

March 1, 1938

Gentlemen:

We enclose check for \$34,200 for which please send us drafts on Calais, France in U. S. dollars payable to

P. G. Wodehouse \$17,100.

Ethel Wodehouse 17,100

Yours sincerely,

Bank of the Manhattan Company  
Madison Avenue at 43rd Street  
New York City.

PR:ML

March 3, 1938

P. G. Wodehouse

in account with

Paul R. Reynolds &amp; Son

Received from Saturday Evening Post for  
All American, Canadian & South American  
serial rights to

THE SILVER TOW

\$40,000

Commission 5%

2,000

\$38,000

U. S. Income Tax 10%

3,800

\$34,200

Ethel Wodghouse share 1/2

17,100

Draft herewith

\$17,100

*Petitioner's Exhibit 4.*

March 3, 1938

Ethel Wodehouse.

in account with

Paul R. Reynolds &amp; Son

Received from Saturday Evening Post for  
All American, Canadian & South American  
serial rights to.

THE SILVER COW

\$40,000.

Commission 5%

2,000.

\$38,000.

U. S. Income Tax 10%

3,800.

\$34,200.

P. G. Wodehouse share 1/2

17,100.

Draft herewith.

\$17,100.

**Petitioner's Exhibit 5.**

(Cert. Tr. Rec. on Rev. p. 136.)

October 15, 1938

Mr. Paul R. Reynolds, Jr.,

Messrs. Paul R. Reynolds &amp; Son,

50 Fifth Avenue,

New York, N. Y.

Dear Mr. Reynolds:

Mr. Wodehouse has sent to me the original of an assignment dated September 1st, 1938, from him to his wife, Ethel Wodehouse, of a one-half share in the manuscript and copyright of his new work entitled "Uncle Fred in the Springtime."

*Petitioner's Exhibit 5.*

He asked me to notify you of the fact of the assignment. Accordingly, in case you should have any dealings regarding this work, you should bear in mind that Mr. and Mrs. Wodehouse each owns a one-half interest in it.

Sincerely yours,

WATSON WASHBURN.

WW:OL

**Petitioner's Exhibit 8.**

(Cert. Tr. Rec. on Rev., pp. 131-134.)

September 16, 1938

Dear Wodehouse:—

Your new story, entitled UNCLE FRED IN THE SPRING-TIME, came in yesterday and I read it part of yesterday afternoon and finished it last night. Then Brandt came into the office this morning and we gave it to him. He asked me if I knew when they would get the balance of it and I said I didn't know but I supposed shortly.

The way you quote verses and different quotations; giving them always a humorous twist, always makes me laugh. I couldn't help laughing when Horace was telling how Ricky jumped off the back of his auto and when he was asked if it didn't give him a start, "yes", he said, "a flying start."

I think the Post will enjoy reading it as much as I did, and, of course, we shall let you know what they say as soon as we hear from them.

I doubt if we can get from the Post a larger price for this story than we did for the last one. Editors are complaining that their advertising is not what it should be.

*Petitioner's Exhibit 8.*

that they are feeling very much what has been called the recession, and we find with other authors that they are not getting the prices they did some time ago. I hope, however, we can make a deal with the Post that will seem to you satisfactory in every way.

Yours sincerely,

P. G. WODEHOUSE, Esq.,

Low Wood

Le Touquet

France

PR:B

EDITORIAL ROOMS

THE SATURDAY EVENING POST  
THE CURTIS PUBLISHING COMPANY

WESLEY WINANS STOUT, EDITOR

PHILADELPHIA

OCT 15 1938

October 14, 1938

Dear Mr. Reynolds:

We have read the balance of the new Wodehouse serial, UNCLE FRED IN THE SPRINGTIME, and like it, but I am going to ask your indulgence for a few days. Several of us feel that the story, although it is a very good one, needs a certain amount of clarification in the early sections, but I am not at all sure that Mr. Stout shares this feeling and I'd like to hold the manuscript against his return next week rather than to buy it now. I hope this will be all right with you.

Sincerely,

STUART BOSS

Mr. Paul Reynolds, Sr.

SR MEM.



*Petitioner's Exhibit 8.*

EDITORIAL ROOMS

THE SATURDAY EVENING POST  
THE CURTIS PUBLISHING COMPANY

WESLEY WINANS STOUT, EDITOR

PHILADELPHIA

Dec 13 1938

December 12, 1938

Dear Paul:

Glad to tell you we liked the revision of the Wodehouse story, *UNCLE FRED IN THE SPRING TIME*, and are keeping it for *The Post*. A check for \$40,000.00 will be forwarded. Next Friday, I will talk to you about his next one.

Sincerely,

ERD

Mr. Paul Reynolds, Jr.

EB:CS

*Petitioner's Exhibit 8.*

**THE CURTIS PUBLISHING COMPANY**

INDEPENDENCE SQUARE  
Philadelphia

December 13, 1938

Paul R. Reynolds & Son  
599 Fifth Avenue  
New York City

We inclose herewith our check  
in payment for

Forty Thousand Dollars  
Serial: Uncle Fred In the  
Springtime

\$40,000.00

By P. G. Woodhouse

**IMPORTANT**

This check is offered and accepted with the understanding that The Curtis Publishing Company buys all rights in and of all stories and special articles appearing in its publications and with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.

**MOTION-PICTURE RIGHTS**

Please note that our reservation of serial rights (which includes publication in one installment) includes new story versions based on motion-picture or dramatic scenarios of short stories and serials that have appeared in Curtis publications, and that we permit the use of such versions only under the following conditions: Such synopsis, scenario, or new story version shall not exceed fifteen hundred (1500) words in length when based on a short

*Petitioner's Exhibit 8.*

story appearing complete in one issue, or five thousand (5000) words when based on a serial appearing in two or more issues, or a series of not less than three connected short stories from which a single picture is to be made. Such synopsis shall appear only in circular matter, press books, press notices, trade journals and in magazines devoted exclusively to dramatic or motion-picture matter, and shall in no event appear as having been written by the author. When selling motion-picture or dramatic rights of matter, you must notify the producer to this effect, so that there may be no misunderstanding on his part and no infringement of our rights.

THE CURTIS PUBLISHING COMPANY

PAUL R. REYNOLDS & SON  
599 Fifth Avenue

52

New York Dec. 19, 1938 No. 17977

Pay to the  
order of Bank of the Manhattan Co. \$34,083.31/100  
Exactly Thirty Four Thousand Eighty Three Dollars  
Thirty One Cents Exactly Dollars

PAUL R. REYNOLDS, JR.

Chartered 1799

BANK OF THE MANHATTAN COMPANY R  
Madison Avenue at 43rd Street  
New York

*Petitioner's Exhibit 8.*

December 19, 1938

Gentlemen:

We enclose check for \$34,083.31 for which please send us drafts on Calais, France in dollars payable to

Ethel Wodehouse \$17,000.00

P. G. Wodehouse 17,083.31

Yours sincerely,

Bank of the Manhattan Co.  
Madison Avenue at 43rd Street  
New York City

RR:ML

December 19, 1938

Ethel Wodehouse

in account with

Paul R. Reynolds &amp; Son

Received from Saturday Evening  
Post for all American, Canadian  
and S. American serial rights to  
UNCLE FRED IN THE SPRINGTIME

\$40,000.

Commission 5% \$2,000.

U. S. Income Tax 10% 4,000.

6,000.

34,000.

P. G. Wodehouse, share,  $\frac{1}{2}$  17,000.

Draft herewith

\$17,000.

Petitioner's Exhibit 8.

December 21, 1938

P. G. Wodehouse

in account with

Paul R. Reynolds & Son

Received from

Bell Syndicate for sale on IF I  
WERE YOU

\$ 3.75

McGraw-Hill Book Co. for right to  
reprint FAREWELL TO LEGS in  
Modern Short Stories

50.00

Ryerson Press—reprint use of THE  
CUSTODY OF THE PUMPKIN

25.00 \$ 78.75

Commission 5%

3.93

U. S. Income Tax 10%

7.87

11.80

\$ 66.95

Dodd, Mead and Company—royalty  
to Aug. 1, 1938 on PICEADILLY JIM

19.25

Commission 5%

\$ .96

U. S. 10% Income Tax

withheld by Dodd, Mead 1.93

2.89

16.36

Saturday Evening Post—All Ameri-  
can, Canadian and S. American  
serial rights to UNCLE FRED IN  
THE SPRINGTIME

40,000.00

Commission 5%

2,000.

U. S. Income Tax 10%

4,000.

6,000.00

34,000.00

1/2 to Ethel Wodehouse

17,000.00 17,000.00

Draft herewith

\$17,083.31



**Petitioner's Exhibit 9.**

(Cert. Tr. Rec. on Review, pp. 135-136.)

DATED

1ST SEPTEMBER

1938

P. G. WODEHOUSE ESQ.

—to—

MRS. E. WODEHOUSE

---

ASSIGNMENT

---

AN AGREEMENT made the first day of September One thousand nine hundred and thirty-eight BETWEEN PELHAM GRENVILLE WODEHOUSE of Low Wood Le Touquet in the Republic of France (hereinafter called "Mr. Wodehouse") of the one part and ETHEL WODEHOUSE the wife of the said Pelham Grenville Wodehouse of Low Wood Le Touquet aforesaid (hereinafter called "Mrs. Wodehouse") of the other part WHEREAS Mr. Wodehouse is the author of certain works and manuscript entitled "Uncle Fred in the Springtime" which has not been published And Whereas Mr. Wodehouse has agreed with Mrs. Wodehouse to assign to her one-half share or interest in the said manuscript and the copyright therein.

NOW IT IS HEREBY AGREED between the parties hereto as follows:—

1. IN consideration of the natural love and affection of Mr. Wodehouse for his wife Mr. Wodehouse hereby assigns to Mrs. Wodehouse one-half share or interest in the copyright in the said works and the property in the manuscript.

*Petitioner's Exhibit 9.*

2. MR. WODEHOUSE warrants that he is the owner of the said manuscript and the copyright therein

AS WITNESS the hands of the parties hereto.

**PELHAM GRENVILLE WODEHOUSE**

SIGNED by the said Pelham  
Grenville Wodehouse in the  
presence of:—

CYRIL BLACKHORN

**ETHEL WODEHOUSE**

SIGNED by the said Ethel  
Wodehouse in the presence  
of:—

M. WHITELAW  
Villa Georgette  
21 rue des Vormands  
Paris Plage (P. d. C)

**Designated Portion of Petitioner's Exhibit 14.**

(Cert. Tr. Rec, on Rev. pp. 137-140.)

(Same as Petitioner's Exhibit 5.)

## Petitioner's Exhibit 15.

(Cert. Tr. Rec. on Rev., p. 141.)

### HEARST'S INTERNATIONAL COSMOPOLITAN

Hearst Magazine Building  
Fifty-seventh Street and Eighth Avenue  
New York City

July 23, 1941

Jul 24 1941

Mr. Paul R. Reynolds, Sr.  
599 Fifth Avenue  
New York City

Dear Mr. Reynolds:

THIS will confirm our purchase of the article entitled MY YEAR BEHIND BARBED WIRE by P. G. Wodehouse for Two Thousand Dollars (\$2,000.00). We are buying all American and Canadian serial rights (which include all American and Canadian magazine, digest, periodical and newspaper publishing rights).

It is understood and agreed that the author, and you as his agent, will not use or permit the use of this article or any part or parts thereof (1) in any manner or for any purpose until thirty (30) days after magazine publication and (2) in connection with or as the basis for any motion and/or talking picture(s), radio broadcast(s); television, dramatic production(s) or public performance(s) throughout the world unless the words "Based on (or taken from) literary material originally published in Cosmopolitan" immediately precede or follow or otherwise accompany the title of any and all such motion and/or talking pictures, radio broadcasts, telecasts, dramatic productions or public performances.

*Petitioner's Exhibit 15.*

Your signature hereon will constitute an agreement between us.

Sincerely yours,

FRANCES WHITING  
FRANCES WHITING

ACCEPTED:

DATE:

I am accepting the above letter on the condition that publication of this article can be released in England simultaneously with publication in *Cosmopolitan Magazine* (despite the wording of (1) in the second paragraph); with the further understanding that *Cosmopolitan* will permit no digest or newspaper publication of this article without the consent of the author or his agent in writing; and with the further condition that we receive payment not later than September 1, 1941.

**Petitioner's Exhibit 16.**

(Cert. Tr. Rec. on Review, p. 142.)

**THE CURTIS PUBLISHING COMPANY,**  
 INDEPENDENCE SQUARE  
 PHILADELPHIA

12 August 1941

Paul R. Reynolds & Son  
 599 Fifth Ave.  
 New York, N. Y.

Forty Thousand Dollars We inclose herewith our check  
 in payment for  
 \$40,000.00

Serial: **MONEY IN THE BANK**  
 by P. G. Wodehouse

**IMPORTANT**

This check is offered and accepted with the understanding that The Curtis Publishing Company buys all rights in and of all stories and special articles appearing in its publications and with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except North American (including Canadian) serial rights.

**MOTION-PICTURE RIGHTS**

Please note that our reservation of serial rights (which includes publication in one installment) includes new story versions based on motion-picture or dramatic scenarios of short stories and serials that have appeared in Curtis publications, and that we permit the use of such versions only under the following conditions:



*Petitioner's Exhibit 16.*

synopsis, scenario, or new story version shall not exceed fifteen hundred (1500) words in length when based on a short story appearing complete in one issue, or five thousand (5000) words when based on a serial appearing in two or more issues, or a series of not less than three connected short stories from which a single picture is to be made. Such synopsis shall appear only in circular matter, press books, press notices, trade journals and in magazines devoted exclusively to dramatic or motion-picture matter, and shall in no event appear as having been written by the author. When selling motion-picture or dramatic rights of matter, you must notify the producer to this effect, so that there may be no misunderstanding on his part and no infringement of our rights.

THE CURTIS PUBLISHING COMPANY

**Respondent's Exhibit G.**

(Cert. Tr. Rec. on Review, pp. 147-148.)

**MEMORANDUM**

This is to certify that the attached photostat is a true copy of the Assessment List of the jeopardy assessment for the year 1938 assessed against Pelham G. Wodehouse, c/o Perkins, Malone & Washburn, 36 West 44th Street, New York, N. Y. appearing on the records of the Third District of New York.

The assessment for the year 1938 appears on the Commissioner's List 1944 under Account No. June-04 Special #1.

This is also to certify that I have the legal custody of the Income Tax records filed in the office of the Collector of Internal Revenue for the Third District of New York.

**JAMES W. JOHNSON**

Collector of Internal Revenue  
Third District of New York

October 18, 1945.

Initials illegible

**ASSESSMENT CERTIFICATE  
COMMISSIONER'S ASSESSMENT LIST**

**THIRD District of NEW YORK Month JUNE SPECIAL #1  
Year 1944**

**Additional Assessments made by Commissioner:**

**Personal—\$49258.14**

**JLD 6-19-43 ROSS**

**CONTROL**

**BILLS 7658 JUN 21 1944**

**CARDS**

**Total Assessments**

**\$49258.14.**

## Respondent's Exhibit G.

I hereby certify that I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected and as specified in the supplementary pages of this list made by me are due from the individuals, firms and corporations opposite whose names such amounts are placed, and that the amount chargeable to the collector is as above.

Dated at Washington; D. C.

Office of Commissioner of Internal Revenue, June 14, 1944  
J.G. N.D.C.

JOSEPH D. NUNAN JR  
Commissioner of Internal Revenue

## ASSESSMENT LIST

## INCOME TAX

District Third New York, List June Special #1 1944

	Date	Debit	New Balance	Remarks
Pelham G Wodehouse c/o Perkins Malone & Washburn		2802 08	3180 17	1040 Sub
	Int	878 09		273 Rar
36 West 44th St New York N.Y. June 00P Spl #1 1941				Int to 6-14-44 DL Dec 2 1944

Pelham G Wodehouse c/o Perkins Malone & Washburn		12220 86	16069 59	1040 Sub
	Int	8848 73		273 Rar
36 West 44th St New York N.Y. June 04P Spl #1 1938				Int to 6-14-44 DL Dec 2 1944

# **Petition for Review.**

(Filed September 8, 1947.)

(Cert. Tr. Rec, on Review, pp. 149-151.)

IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FOURTH CIRCUIT  
Tax Court Docket No. 6487

---

PELHAM G. WODEHOUSE,

Petitioner on review,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent on review.

---

Taxpayer, the petitioner in this case, by Watson Washburn, his counsel and attorney of record, hereby petitions the United States Circuit Court of Appeals for the Fourth Circuit to review the decision of the Tax Court of the United States rendered on June 10, 1947 determining deficiencies in the Federal income tax of petitioner for the calendar years and in the amounts respectively stated as follows:

1938

\$11,806.71

1941

1,854.85

This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the United States Internal Revenue Code.

1. The party seeking the review is the petitioner, Pelham G. Wodehouse.



*Petition for Review.*

2. The taxable periods involved are the calendar years 1938 and 1941.

3. The Court, by which review is sought, is the Circuit Court of Appeals of the United States, Fourth Circuit.

4. The petitioner filed his income tax returns for the taxable years 1938 and 1941 with the Collector of Internal Revenue for the District of Maryland located at Baltimore, Maryland, the office of which Collector is situated within the jurisdiction of the United States Circuit Court of Appeals for the Fourth Circuit, wherein this review is sought.

WATSON WASHBURN

Attorney for Petitioner on review



## Statement of Points.

(Filed October 1, 1947.)

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[SAME TITLE.]

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(Cert. Tr. Rec. on Review, pp. 152-154.)

Now comes Pelham G. Wodehouse, the petitioner on review herein, by his attorney of record and counsel, Watson Washburn, and hereby asserts the following errors which he intends to rely upon in this review:

The petitioner assigns as errors the following acts and omissions of the Tax Court of the United States:

1. The holding and finding that the lump sums received for serial and other rights were periodical royalties subject to tax.
2. The failure to hold and find that said sums received for literary property were not the proceeds of absolute transfers of copyright, and accordingly the proceeds of sales rather than royalties.
3. The failure to hold and find that such sums were not the realization of virtually the entire value of said literary property and accordingly the proceeds of sales rather than royalties.
4. The holding and finding as to the year 1938 that there was no real donative intent in petitioner's assignments of literary property to his wife.
5. The holding and finding as to the year 1939 that the proceeds of such literary property were taxable wholly to petitioner.

*Statement of Points.*

6. The failure to hold and find as to the year 1938 that petitioner was taxable on not more than an undivided one-half interest in such proceeds.

7. The failure to hold and find that respondent's additional assessment for the year 1938 was not barred by the Statute of Limitations.

8. The failure to hold and find that approximately 6% of such payments received for serial and other rights in said property was allocable to the Canadian rights and, therefore, exempt from tax in any event.

9. The failure to find and determine the period during which interest on any deficiency determined against petitioner should be suspended, pursuant to Internal Revenue Code Section 3804, and the amount of interest, if any, properly assessable against petitioner.

10. The determination for the year 1938 of a deficiency of \$11,806.71 instead of an overpayment of \$6,908.76.

11. The determination for the year 1941 of a deficiency of \$1,854.85 instead of an overpayment of \$14,290.12.

WATSON WASHBURN

Attorney for Petitioner on Review

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE FOURTH CIRCUIT

No. 5694

PELHAM G. WODEHOUSE, PETITIONER

*versus*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition to Review the Decision of the Tax Court of the  
United States

November 22, 1947, the transcript of record is filed and the cause docketed.

Same day, certified copy of order extending time to December 5, 1947, for the preparation, transmission and delivery of the record on petition for review is filed.

November 25, 1947, the appearance of Theron L. Caudle, Assistant Attorney General, and Helen R. Carlross, Special Assistant to the Attorney General, is entered for the respondent.

November 28, 1947, the appearance of Watson Washburn is entered for the petitioner.

December 3, 1947, the appearance of Charles Oliphant, Chief Counsel, and Claude R. Marshall, Special Attorney, Bureau of Internal Revenue, is entered for the respondent.

December 5, 1947, statement under section 3 of rule 10 is filed.

December 18, 1947, stipulation to continue case from the January term to the April term, 1948, is filed.

December 30, 1947, brief and appendix on behalf of the petitioner are filed.

January 6, 1948, stipulation as to the time for the filing of the respondent's brief is filed.

January 9, 1948, the appearance of George A. Stinson, Helen Goodner and Melva M. Graney is entered for the respondent.

*Argument of Cause*

January 9, 1948 (January term, 1948) cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

January 19, 1948, reply brief on behalf of the petitioner is filed.

Opinion—Filed March 16, 1948

United States Circuit Court of Appeals, Fourth Circuit

No. 5694

PELHAM G. WODEHOUSE, PETITIONER

*versus*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition to Review the Decision of the Tax Court of the  
United States

(Argued January 9, 1948. Decided March 16, 1948)

Before PARKER, SOPER and DOBIE, Circuit Judges

Watson Washburn for Petitioner, and Melva M. Grancy, Special Assistant to the Attorney General, (Theron Lamar Caudle, Assistant Attorney General; Sewall Key, George A. Stinson and Helen Goodner, Special Assistants to the Attorney General, on brief) for Respondent.

SOPER, Circuit Judge:

This petition for review seeks a reversal of a decision of the Tax Court which determined deficiencies in income tax of the taxpayer in the amounts of \$11,806.71 for the year 1938 and \$1,854.85 for the year 1941. Pelham G. Wodehouse, the taxpayer, is the well known author of numerous novels, short stories and other literary works. He is a British subject and has resided in England and in France with the exception of a period in 1936 and 1937 when he resided in California. While he was in the United States he was advised by his attorney that he could reduce his income tax liability as to earnings in this country if he would convey to his wife a one-half interest in his writings before any income was realized from them. Accordingly, in 1938, after his return to England, the taxpayer assigned to his wife an undivided one-half interest in two unpublished novels called "The Cow-Creamer" and "Uncle Fred in the Springtime," and he notified his agent in the United States that any contracts and payments for the sale of these novels should be made for the joint benefit of himself and his wife.

On February 22, 1938, the Curtis Publishing Company, publisher of the Saturday Evening Post, accepted "The Cow-Creamer" and sent a check to the taxpayer's agent in the United States for \$40,000 in payment thereof. The agreement of purchase provided that the



Publishing Company purchased all rights in the story appearing in its periodical, and would obtain a copyright on the contents of its magazine, but that after publication therein was completed, it would reassign to the author on demand all rights in the story except the American (including Canadian and South American) serial rights. The Post circulates both in the United States and Canada.

On December 13, 1938, the Curtis Publishing Company accepted the novel "Uncle Fred in the Springtime" on the same terms and for the same consideration as in the case of "The Cow-Creamer."

The money paid by Curtis for the rights in these two novels was transmitted to the taxpayer's agent, which, after deducting its commission and taxes, remitted one-half the balance to the taxpayer and one-half to his wife.

On July 23, 1941, the agent sold to Hearst's International Cosmopolitan Magazine for \$2,000 all American and Canadian serial rights in an article entitled "My Years Behind Barbed Wire" written by the taxpayer; and on August 12, 1941, the agent sold to the Curtis Publishing Company the rights in "Money in the Bank" for \$40,000. The rights in this novel were purchased subject to the same agreement to reassign as in the case of "The Cow-Creamer" and "Uncle Fred in the Springtime."

The Commissioner took the view that the payments above described constituted income of the taxpayer in 1938 and 1941 under Section 211(a)(1)(A) of the Internal Revenue Code, 26 U. S. C. A. §211(a)(1)(A), and assessed deficiencies accordingly. Section 211(a)(1)(A) provides that in the case of a non-resident alien not engaged in trade or business within the United States, there shall be imposed a tax upon amounts received within the United States as "interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, *or other fixed or determinable annual or periodical gains, profits and income* \* \* \* ." (Italics supplied) The Tax Court sustained the Commissioner's determination.

The taxpayer contends to the contrary—that the monies received in 1938 and 1941 did not fall within the purview of Section 211(a)(1)(A), first, because they were received from persons in payment for personal property sold by him, and second, because the payments were not made in annual or periodical amounts as described in the statute, but in each instance were made in a lump sum.

The point at issue will be more clearly understood by taking account of certain amendments to the statute which were enacted in 1936. Prior to that year the taxable gross income of non-resident aliens included gross income from all sources within the United States; and a part of this income, corresponding, with the exception of dividends, to that described in Section 211(a)(1)(A) quoted



above, was subject to a withholding tax. See 26 U. S. C. A. (1934 Ed.) §211(a) as defined in Section 119(a); and Section 143(b). In 1936 Section 143(b) was amended so as to add dividends to the categories of income subject to the withholding tax; and Section 211(a) was amended so that in the case of a non-resident alien not engaged in trade or business in the United States, the income tax was limited to the same categories of income to which the withholding tax applied. The effect of these amendments was (1) to exclude from the tax all gains received by such aliens from the sale of real or personal property located in the United States which theretofore had been taxable, and (2) to include dividends in the categories of taxable income.

The reasons for the changes in the statute were set out in the report of the Senate Finance Committee (S. Rep. No. 2156, 74th Cong., 2d Sess., p. 21) as follows:

"In Section 211(a) it is proposed that the tax on a non-resident alien not engaged in a trade or business in the United States and not having an office or place of business therein, shall be at the rate of 10 percent on his income from interest, dividends, rents, wages, and salaries and other fixed and determinable income, with no allowance for the deductions from gross income and credits against net income allowed to individuals subject to normal tax and surtax on net income. \* \* \* This flat tax (in the usual case) is collected at the source by withholding as provided for in section 143. Such a non-resident alien will not be subject to the tax on capital gains, including so-called gains from hedging transactions, as at present, it having been found administratively impossible effectually to collect this latter tax. It is believed this exemption from tax will result in considerable additional revenue from the transfer taxes and from the income tax in the case of persons carrying on the brokerage business. The principal increase in revenue will result, however, from withholding tax on dividends heretofore not required."

See also the Committee Report in the House of Representatives, (H. Rep. No. 2475, 74th Cong., 2d Sess., p. 9).

Both of the defenses offered by the taxpayer were rejected by the court in *Rohmer v. Commissioner*, 2 Cir., 153 F. 2d 61, in a decision involving similar facts; but after careful consideration, we find ourselves unable to adopt that court's conclusions. In that case a non-resident author received lump sum payments for the American and Canadian magazine and newspaper serial and radio rights to one of his stories, with authority to copyright the story, but the taxpayer retained the book, motion picture and stage production rights of the story. The court held that there was no sale of

personal property" because (p. 63): "Where a copyright owner transfers to any particular transferee substantially less than the entire 'bundle of rights' conferred by the copyright, then payment therefor, whether in one sum or in several payments, constitutes royalties within the meaning of §211(a)(1)(A). For such a transfer is the grant of a license." This holding, as the authorities cited show, is based on the notion that a copyright is an indivisible property which cannot be split up into the parts of which it is composed, and that any attempt to do so does not amount to the transfer of separate properties to the several assignees but merely to grants of licenses. The language of some of the decisions gives seeming support to this idea; but when the exact point in controversy in these cases is ascertained, it will be seen that the courts were concerned with procedural matters and did not undertake to controvert the undeniable fact that serial rights, book rights, dramatic production rights and motion picture rights of a literary production are property rights which may be and are separately and effectively bought and sold in the literary market. The courts, however, did point out that the terms of the statute with regard to the assignment and protection of copyrights, see 17 U. S. C. A. §§28, 101, 112, require the holding that only the owner of a copyright may sue for its infringement because otherwise a wrongdoer might be subject to more than one recovery for the redress of one wrong since he might be subject to successive suits by different persons holding different parts of the corporate property.<sup>1</sup>

The authorities cited in *Rohmer v. Commissioner*, *supra*, on the indivisibility of the copyright do not show that there is anything inherent in the nature of a copyright which renders impossible the separate sales of the several parts which comprise the whole.<sup>2</sup> For

<sup>1</sup> That this is the true meaning and limitation of the rule is shown by an examination of the authorities cited in *Rohmer v. Commissioner*, *supra*, and in other decisions. The earliest expression of the rule appears in certain dicta of Lord St. Leonards in *Jefferys v. Boosey*, 4 H. L. 815, 993, in 1854. See also *I. T.* 2735, XII-2, Cum. Bull. p. 131 (1933). *Keene v. Wheatley*, C. C. Pa., 14 Fed. Cases No. 7644, pp. 180, 186; *Black v. Henry G. Allen Co.*, C. C. N. Y., 42 F. 618, 621; *Empire City Amusement Co. v. Wilton*, C. C. Mass., 134 F. 132; *New Fiction Publishing Co. v. Star Co.*, D. C. N. Y., 220 F. 994; *Goldwyn Pictures Corp. v. Howells Sales Co.*, 2 Cir., 282 F. 9; *Witmark v. Pastime Amusement Co.*, D. C. N. C. 298 F. 470, *aff'd*, 2 F. 2d 1020. It may be noted that this view has not been unanimous. Thus, in *Roberts v. Myers*, C. C. Mass., 20 Fed. Cases No. 11906, p. 898, it was expressly stated that a copyright was divisible, and in *Ford v. Blaney Amusement Co.*, C. C. N. Y., 148 F. 642, *Fitch v. Young*, D. C. N. Y., 230 F. 742, and *Public Ledger Co. v. New York Times*, D. C. N. Y., 275 F. 562, *aff'd*, 279 F. 747, it was held that a copyright was divisible to the extent that the statute, by categorization, recognized separate or distinguishable rights comprising the copyright. See 17 U. S. C. A. §1.

<sup>2</sup> The final decision on the point in the Second Circuit has not been reached without difficulty. Thus in *Sabatini v. Commissioner*, 2 Cir., 98 F. 2d 753, the court held that the grant of exclusive world wide motion picture rights for ten years of a book by a nonresident alien author for a substantial lump sum

example, in *New Fiction Pub. Co. v. Star Co.*, D. C. S. D. N. Y., 220 F. 997, which was cited with approval in *Goldwyn Pictures Corp. v. Howells-Sales Co.*, 2 Cir., 282 F. 9, and also in *Rohmer v. Commissioner*, *supra*, the court relied upon the following quotation from Bowker on Copyrights, Its History and Its Law, Ed. 1912, p. 49, as follows:

"There can be no such thing as a copyright for a special purpose, or for a special locality, or under other special conditions, for there can be only one copyright, and that a general copyright, in any one work. But specific contracts can be made, enforceable under the law of contracts, as for the sale of a copyrighted book within a certain territory, provided such contracts or limitations are not contrary to other laws. Although record of assignment in the Copyright Office is provided for by the law only for the copyright in general, the separate estates, as a right to publish in a periodical and the right to publish as a book, may be sold and assigned separately, and the special assignment recorded in the Copyright Office, though this does not convey a right to substitute in the copyright notice a name other than that of the recorded proprietor of the general copyright, which can only be changed as specifically provided in the law under recorded assignment of the entire copyright." (Italics supplied)

The courts have been repeatedly admonished that in matters of taxation they should be governed by the substance rather than the form of a transaction and should not be diverted from the realities by undue consideration of the technical refinements of title to property. *Helvering v. Hallock*, 309 U. S. 106, 116-8; *Griffith v. Commissioner*, 308 U. S. 355, 357; *Klein v. United States*, 283 U. S. 231, 234; *Corliss v. Bowers*, 281 U. S. 376, 378. Congress has declared that the gains of non-resident aliens from the sale of real and personal property shall not be taxed; and it seems to us that the will of Congress is frustrated when that which is generally recognized in the commercial exploitation of literary works as a sale is subjected to the incidence of the tax under a different name. The inconsistency of such an assessment becomes entirely clear in this case in view of the concession that if the taxpayer had sold his entire property in his work for a money consideration, and had made an assignment of his whole copyright, he would have received no taxable income.

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was not a sale but a license; but in *Goldsmith v. Commissioner*, 2 Cir., 143 F. 2d 466, the majority of the court held that a grant of exclusive motion picture rights of a play was a sale; and in *General Aniline & Film Corp. v. Commissioner*, 2 Cir., 139 F. 2d 759, the court held that the assignment of a partial interest in a patent was a sale and not a license. To the same effect as the decision in the last mentioned case was the holding in *Commissioner v. Celanese Corp.*, App. D. C., 140 F. 2d 339.

We cannot suppose that Congress intended to exempt the proceeds of a single sale of all the rights in a literary production to one person, but to tax the proceeds of separate sales or parts of the whole.

The technical and unsubstantial nature of the opposite view is finally shown by the disappearance of any practical difficulty in the transfer and protection of the various rights in a literary work when they are separately assigned. That was accomplished in the instant case by the transfer of the right to copyright the stories to the Curtis Publishing Company under an agreement to reassign to the author all except the serial rights after the serial publication had been completed. This transfer would seem a sufficient answer to the Commissioner's contention if technicalities of title alone are considered,<sup>3</sup> since there is no reason to believe that the transfer was made in this form in order to avoid taxation. Our decision, however, does not rest on this basis. It rests on the inherent nature of the transfer, and on the further fact that the only ground for the indivisible theory, (that is, the inability of the assignee of a part of a copyright to sue for infringement), has been swept away by the decision of the Supreme Court in *Independent Wireless Co. v. Radio Corp. of America*, 269 U. S. 459. It was there held that an exclusive licensee of certain rights under a patent, in a suit for the infringement of those rights, may join the owner of the patent as a codefendant if he is within the jurisdiction of the court, or as an involuntary coplaintiff if he is without the jurisdiction of the court and has refused to prosecute the suit. It has been held in the Second Circuit that this holding is applicable in the field of copyright law. See *Stephens v. Howells Sales Co.*, D. C. N. Y., 16 F. 2d 805; *L. C. Page & Co. v. Fox Film Corp.*, 2 Cir., 83 F. 2d 196; and the same rule has been incorporated in the Federal Rules of Civil Procedure, Rule 19(a) and notes of the Advisory Committee thereto.

In addition to and apart from the conclusion that the lump sum payments received by the author were exempt from taxation since they constituted the proceeds of the sales of personal property, we are satisfied that they do not come within the positive terms of the taxing statute, Section 211(a)(1)(A), because they do not answer to the description "annual or periodical gains." This seems immediately obvious since the payment of a single sum for a right or privilege can hardly be said to be annual or periodical. The several kinds of income listed in the statute do not expressly include

<sup>3</sup> This conclusion was reached in *Elliot v. Geare-Marston, Inc.*, E. D. Pa., 30 F. Supp. 301, wherein was held, with reference to a similar Curtis contract, that Curtis became the owner of the copyright and that the effect of the reassignment was to constitute the author an exclusive licensee of all rights other than the reserved serial rights.



royalties; but Section 119(a) (4) of the Internal Revenue Code as it existed both before and after the 1936 amendments provided that gross income from sources within the United States shall include royalties for the use of copyrights in the United States. Moreover, as pointed out in *Rohmer v. Commissioner, supra*, the Revenue Acts from 1918 until 1936 inclusive contained a provision substantially like the present section 143(b) of the Internal Revenue Code and the regulations interpreting this section have declared that certain kinds of income, other than those specifically listed, such as royalties, are included in the tax. See Regulations 101, Article 143-2; Article 211-7; Regulations 103, Section 19, 143-2, 3; Section 19, 211-7. Hence it is reasonable to conclude that Congress intended Section 211(a) (1) (A), as enacted in 1936, to include royalties.

The regulations, however, specify that only annual or periodical income is taxable. For example, Treasury Regulations 101, Article 143-2, promulgated under the Revenue Act of 1938, provide as follows:

"Only fixed or determinable annual or periodical income is subject to withholding. The Act (Internal Revenue Code) specifically includes in such income, interest, dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations and emoluments. But other kinds of income are included, as, for instance, royalties.

Income is fixed when it is to be paid in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the amount to be paid may be ascertained. The income need not be paid annually if it is paid periodically; that is to say, from time to time, whether or not at regular intervals. That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical. \* \* \* The income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income."

The answer given in *Rohmer v. Commissioner, supra*, to this phase of the case is twofold. First, it is said that a royalty which is often or usually paid in installments is no less a royalty when it is disbursed in a single amount; and that the phrase "annual or periodical" is descriptive of the nature or type of income regardless of the actual manner of payment. The obvious flaw in this statement is that it ignores the plain meaning of the statutory terms. The section does not tax all payments or all royalties but only those which are "fixed or determinable annual or periodical gains"; and



it is only by excising from the Act the words "annual or periodical" that the conclusion stated by the court can be reached. Indeed, that is precisely what the court does for it says in so many words, (p. 64): "that Congress intended the words 'other fixed or determinable annual or periodical gains, profits and income' to be interpreted to mean 'other fixed and determinable income.'" It seems to us that this amounts to an amendment of the Act which the court is powerless to make.<sup>4</sup>

The second answer of the court on this branch of the case is based upon statements in the Congressional Committee Reports with reference to the 1936 amendments wherein it was said that the tax on capital gains of aliens was excluded because it was found impossible effectually to collect it, and because it was believed the amendment would be productive of substantial amounts of additional revenue since it replaced a theoretical system impractical of administration in a great number of cases. Since the payment of a lump sum for a copyright privilege is not at all impossible to collect effectively, and since Congress sought substantial amounts of revenue by the taxation of non-resident aliens, the court concluded that lump sum payments to non-resident aliens for copyright privileges were included within the statute. The argument obviously proves too much for it would lead to the conclusion, which the regulations expressly preclude, that capital gains from the sale of real estate, which could be as easily ascertained and collected as the gains from the sale of literary property, are subject to tax. Moreover, the report of the Senate Committee hereinbefore set out makes quite clear the difficulty that the taxing authorities had previously experienced and the manner in which the losses incurred by excluding gains from the sale of real and personal property were to be made up. The report showed that the tax on capital gains, including so-called gains from hedging transactions, were to be excluded since it had been found impossible effectually to collect the tax, but that it was believed that this exemption would result in considerable additional revenue from the transfer taxes and from the income tax on persons carrying on the brokerage business, but principally from the withholding tax on dividends which for the first time were included within the purview of the statute. It is not the province of the court to impose a tax upon an item of income which Congress has considered but decided not to tax.

<sup>4</sup> It is not meant to say that a lump sum payment is never subject to taxation under the statute. For example, it was held in *Commissioner v. Raphael*, 9 Cir., 133 F. 2d 442, that interest on a judgment which was paid in a lump sum was taxable under the section because the gain involved was periodical but such a ruling can have no bearing upon a single payment which is in no way related to the period in which the right is exercised or to the contingency of subsequent performance.

A passing reference was made in the arguments in the pending case to the fact that the Committee Reports with reference to the 1936 Amendments referred in general terms to fixed and determinable income without using the entire phrase "fixed or determinable annual or periodical income"; and from this omission it was contended that the words should be interpreted as they were found in the Committee Reports rather than in the way in which they were used in the statute. It is sufficient to say that we know of no authority for the substitution of the language of a Committee Report for that of the statute to which it relates.

Since we have reached the conclusion that the payments received by the taxpayer were not taxable at all, we have no occasion to consider the question whether the Commissioner should have taxed less than the total amount received from the Curtis Publishing Company which covered publication rights not only in the United States but also in Canada. Nor have we occasion to consider the question whether the taxpayer could reduce his taxable income by transferring to his wife a share of the proceeds from the sale of his literary productions before publication.

Reversed.

DOBIE, Circuit Judge, dissenting: I dissent. On the authority and reasoning of *Rohmer v. Commissioner*, 153 F. (2d) 61, I think the decision of the Tax Court of the United States should be affirmed.

United States Circuit Court of Appeals, Fourth Circuit

No. 5694

PELHAM G. WODEHOUSE, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*Judgment*

Filed and Entered March 16, 1948.

On petition to review the decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decision of the said the Tax Court of the United States, in this cause, be, and the same is hereby reversed;

and that this cause be, and the same is hereby; remanded to the Tax Court of the United States for further proceedings in accordance with the opinion of the Court filed herein.

MORRIS A. SOPER,  
U. S. Circuit Judge.

MARCH 16, 1948.

On another day, to-wit, April 16, 1948, the mandate of this Court, in this cause, is issued and transmitted to the Tax Court of the United States at Washington, D. C., in due form.

*Clerk's Certificate*

UNITED STATES OF AMERICA,  
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to brief of petitioner, and the proceedings in the said Circuit Court of Appeals in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Appeals in said cause, made up in accordance with the request of the Solicitor General of the United States, for use in the Supreme Court of the United States on application for a writ of certiorari.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, this 8th day of May, A. D., 1948.

[SEAL]

[S.] CLAUDE M. DEAN, Clerk,  
U. S. Circuit Court of Appeals, Fourth Circuit.

**Supreme Court of the United States*****Order allowing certiorari.*****(Filed October 11, 1948)**

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1947

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No.

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COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

PELHAM G. WODEHOUSE

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in this case.

**OPINIONS BELOW**

The opinion of the Tax Court (R. 14-28) is reported at 8.T.C. 637 and the opinion of the Circuit

Court of Appeals (R. 90-98) is reported at 166 F. 2d 986.

### **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered on March 16, 1948. (R. 98-99.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

### **QUESTION PRESENTED**

Whether payments made by publishers in the taxable years 1938 and 1941 for the serial rights in the United States and Canada, and in one instance for the book rights, to taxpayer's literary works constitute taxable gross income within the meaning of Section 211(a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code.

### **STATUTES AND REGULATIONS INVOLVED**

The applicable statutes and Treasury Regulations are set forth in the Appendix, *infra*, pp. 12-20.

### **STATEMENT**

The facts found by the Tax Court material to the question presented are as follows:

The taxpayer is a British subject who formerly resided in France. During the taxable years 1938 and 1941 he was a nonresident alien. As a prolific and well known writer of serials, plays, short stories, and other literary works, he has a wide reputation in the United States, and his works were

accepted and published by various magazines. He sold his writings in the United States through literary agents. (R. 15-16.)

On February 22, 1938, the Curtis Publishing Company (hereinafter referred to as "Curtis") accepted for publication in the Saturday Evening Post an unpublished novel entitled "The Cow-Creamer" (or "The Silver Cow"), submitted to it by taxpayer's agent, and sent its check for \$40,000 to the agent on that date. (R. 18.) The memorandum of acceptance provided in part as follows (R. 18-19):

This check is offered and accepted with the understanding that The Curtis Publishing Company buys all rights in and of all stories and special articles appearing in its publications and with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.

The book publication rights to "The Cow-Creamer" were sold for \$5,000 to another publisher, Doubleday, Doran and Company. (R. 19.)

On December 13, 1938, Curtis accepted taxpayer's novel "Uncle Fred in the Springtime", subject to the same agreement of reassignment of rights as was contained in its acceptance of "The

Cow-Creamer", and paid \$40,000 therefor. Both novels were published serially by Curtis during 1939. (R. 19-20.)

On July 23, 1941, taxpayer's agent sold to Hearst's International-Cosmopolitan Magazine for \$2,000 all the American and Canadian serial rights to an article entitled "My Years Behind Barbed Wire", written by taxpayer. (R. 27.)

On August 12, 1941, taxpayer's agent sold to Curtis for \$40,000 all the North American (including Canadian) serial rights to "Money in the Bank", a novel written by taxpayer.<sup>1</sup> (R. 25.)

On these facts the Tax Court held that the \$85,000 paid by Curtis and Doubleday, Doran and Company in 1938 for serial and book rights, respectively, to taxpayer's novels and the \$42,000 paid by Curtis and Hearst's Magazine in 1941 for serial rights to taxpayer's writings represented advance royalties and that, as such, they were "other fixed or determinable annual or periodical gains" within the meaning of Section 211(a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code, with the result that they constitute taxable gross income of taxpayer as a nonresident alien in those years.<sup>2</sup> (R. 26.)

<sup>1</sup> Curtis' letter transmitting its check contained the same arrangement for reassignment of all rights except serial rights as in the case of "The Cow-Creamer". (R. 81-82.)

<sup>2</sup> The Tax Court also decided that the anticipatory assignments by taxpayer to his wife of a one-half interest in the two novels "The Cow-Creamer" and "Uncle Fred in the

On appeal the Circuit Court of Appeals for the Fourth Circuit reversed the decision of the Tax Court. The reversal was based on two grounds—(1) that the lump sum payments constituted the proceeds from sales of personal property and (2) that the payments were not in any event covered by Section 211(a)(1), because they were not “annual or periodical.” Judge Dobie dissented, stating that he thought the decision of the Tax Court should be affirmed on the authority and reasoning of *Rohmer v. Commissioner*, 153 F. 2d 61 (C.C.A. 2d), certiorari denied, 328 U.S. 862. (R. 90-98.)

#### **SPECIFICATION OF ERRORS TO BE URGED**

The Circuit Court of Appeals erred:

1. In holding that the payments made by publishers to taxpayer's United States literary agent in the taxable years were and are to be treated as the proceeds from the sale of personal property

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“Springtime” were not the result of a real donative intent and lacked reality; that the royalties paid to taxpayer's wife in 1938 under these assignments were income of taxpayer; and that the statute of limitations did not bar the assessment of an additional tax for 1938. (R. 21-23.) Finally, it held that no part of the royalties paid in 1938 and 1941 by the publishers constituted income from sources outside the United States so as to be excludable from taxpayer's gross income in those years. (R. 23, 26-27.) These subsidiary holdings of the Tax Court were not passed upon by the Circuit Court of Appeals, because of its decision on the main issue that none of the payments by publishers in 1938 and 1941 were taxable income to taxpayer. Accordingly, these subsidiary questions are not presented in this petition for certiorari.



and in failing to hold that the payments were and should be treated as advance royalties.

2. In holding that the payments were not "other fixed or determinable annual or periodical gains" within the meaning of Section 211(a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code.

### REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Rohmer v. Commissioner*, 153 F. 2d 61, certiorari denied, 328 U.S. 862. Both cases involved the question whether a non-resident alien author is taxable on lump sums paid by a United States publisher to the author's United States literary agent for limited rights to one or more stories written by the author, the other rights in the stories being retained by the author.<sup>3</sup> The answer de-

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<sup>3</sup> There was a slight difference in the form in which the transactions in the two cases were cast. In the *Rohmer* case an endorsement on the checks submitted in payment specified what rights were conferred on the publisher, which included the serial rights [meaning the right to magazine and newspaper publication in serial form] and the authority to copy-right, and stated that there was to be no prior publication anywhere in the world except by special written agreement and no book publication before magazine publication was completed. See R. 13, *Rohmer v. Commissioner*, No. 1151, October Term, 1945. In the present case lump sum payments for the serial rights were made under a memorandum of acceptance which provided as follows (R. 18-19):

depends upon whether such lump sum payments are advance royalties and whether, as such, they constitute "other fixed or determinable annual or periodical gains, profits, and income" within the meaning of Section 211(a)(1) of the Internal Revenue Code and the corresponding provision of the Revenue Act of 1938 (Appendix, *infra*, pp. 13-14) which requires non-resident aliens to pay income tax on amounts received "as interest \* \* \*, dividends, rents, salaries, wages, premiums, annuities compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income." In both the *Rohmer* case and the instant case the taxpayers argued that (1) the lump sum payments were received as the proceeds from the sale of personal property and thus were not taxable for that reason and that (2) the payments, even if advance royalties, were not in any event covered by the statute because they were paid in lump sums rather than annually.

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This check is offered and accepted with the understanding that The Curtis Publishing Company buys all rights in and of all stories and special articles appearing in its publications and with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.

The Circuit Court of Appeals for the Fourth Circuit did not, however, attempt to distinguish the *Rohmer* case on the basis of this difference in the form of the transactions involved.

or periodically. In the *Rohmer* case the Circuit Court of Appeals for the Second Circuit stated that it could not agree that the payments were the proceeds from the sale of personal property rather than advance royalties (153 F. 2d at p. 63), whereas in the present case the Circuit Court of Appeals for the Fourth Circuit held that the payments did constitute the proceeds from the sale of personal property (R. 93-95). In answer to the second contention of the taxpayers in the two cases, the Circuit Court of Appeals for the Second Circuit held in the *Rohmer* case that the phrase "other fixed or determinable annual or periodical gains, profits, and income" is "descriptive of the nature or type of income, regardless of the actual manner of payment" and covers advance royalties (153 F. 2d at p. 63), whereas the Circuit Court of Appeals for the Fourth Circuit in the instant case flatly rejected the Second Circuit's interpretation of the statutory language (R. 96-97) and held that the payments did not answer the statutory description of "annual or periodical" gains (R. 95-96), the theory of the court below apparently being that the statute covers only payments which are actually paid, or perhaps those which accrue, annually or periodically.<sup>4</sup> The conflict in the two de-

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<sup>4</sup> While the court below rejected the interpretation of the statute adopted by the Second Circuit in the *Rohmer* case, it is not entirely clear what interpretation the court below would substitute for the Second Circuit's interpretation. On the one hand the opinion below appears to hold that the language

cisions is direct and clear-cut, as the court below recognized by its statement (R: 92) that it was unable to adopt the conclusions reached in the *Rohmer* case.

2. The decision below raises an important question which should be settled by this Court. Previously it had appeared to be sufficiently established that lump sum payments for the grant of limited rights, such as movie or serial rights, in a literary work of a non-resident alien were to be treated as advance royalties (See *Sabatini v. Commissioner*, 98 F. 2d 753 (C.C.A. 2d); *Rohmer v. Commissioner*, *supra*) and in both the *Rohmer* case and the present case the tax on the lump sum

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“other fixed or determinable annual or periodical gains, profits, and income” covers only amounts which are actually paid annually or periodically (see R. 95-96) but, on the other hand, the court states as follows in a footnote (R. 97):

It is not meant to say that a lump sum payment is never subject to taxation under the statute. For example, it was held in *Commissioner v. Raphael*, 9 Cir., 133 F. 2d 442 [certiorari denied, 320 U. S. 735], that interest on a judgment which was paid in a lump sum was taxable under the section because the gain involved was periodical but such a ruling can have no bearing upon a single payment which is in no way related to the period in which the right is exercised or to the contingency of subsequent performance.

This, together with the statement that “The section does not tax all payments or all royalties but only those which are ‘fixed or determinable annual or periodical’ ” (R. 96), suggests that the court below interpreted the statute as taxing only royalties which are based on a percentage of sales or

payments was withheld and paid by the author's United States agent pursuant to Section 143(b) of the Internal Revenue Code or of the Revenue Act of 1938 (Appendix, *infra*, pp. 12-13), both of which require the deduction and withholding of tax on the identical income upon which Section 211(a)(1) imposes a tax. The decision below, holding that such lump sum payments are not to be treated as advance royalties and are not taxable, introduces confusion in respect of the coverage of both the taxing and withholding section and, because identical language is used in the two sections, affects withholding agents in all jurisdictions of the country. The confusion is increased

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profits, etc., that is, those royalties which are earned or accrue annually or periodically.

It will be noted that both of the two possible interpretations adopted by the court below are repugnant to the plain language of the statute. Since amounts paid as interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments are specifically covered, the phrase "or other fixed or determinable annual or periodical gains, profits, and income" must relate to income of the same type, not to the manner of payment. And, since some of the designated categories of income, such as compensations, remunerations and emoluments, are not only susceptible of lump sum payment but are not necessarily earned and do not necessarily accrue annually or periodically, the only logical interpretation of the statute is that it taxes all types of income which are fixed or determinable and are usually, but not necessarily, paid annually or periodically. Such an interpretation is consistent with the legislative history of the statutory language and with the pertinent decisions, as we showed in our Brief in Opposition in the *Rohmer* case, No. 1151, October Term, 1945.



by the failure of the court below to interpret the taxing section affirmatively, as distinguished from negatively. On the one hand, the decision holds that lump sum payments for the grant of limited rights in a literary work of a non-resident alien are exempt from tax as constituting the proceeds of a sale and, on the other hand, implies that periodic payments for the grant of the same limited rights might constitute royalties and be taxable. Further, the decision, by reason of its ultimate holding, also would confer upon non-resident aliens a tax advantage not enjoyed by authors who are citizens of the United States, the income from the writings of citizen authors engaged in the business of writing being subject to tax as ordinary income rather than as capital gain from the sale of property (*Goldsmith v. Commissioner*, 143 F. 2d 466 (C.C.A. 2d), certiorari denied, 323 U.S. 774). It is therefore important that this Court resolve the confusion resulting from the decision below and at the same time determine whether Congress intended to confer upon non-resident aliens the tax advantage and convenient means of tax avoidance reflected by the result reached below.

#### CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,  
*Solicitor General.*

June, 1948.

## APPENDIX

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 119. INCOME FROM SOURCES  
WITHIN UNITED STATES.

(a) *Gross Income from Sources in United States.*—The following items of gross income shall be treated as income from sources within the United States:

\* \* \* \* \*

(4) *Rentals and royalties.*—Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, goodwill, trade-marks, trade brands, franchises, and other like property; and

(5) *Sale of real property.*—Gains, profits, and income from the sale of real property located in the United States.

(6) *Sale of personal property.*—For gains, profits, and income from the sale of personal property, see subsection (e).

\* \* \* \* \*

SEC. 143. WITHHOLDING OF TAX AT  
SOURCE.

\* \* \* \* \*

(b) *Nonresident Aliens.*—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the con-

trol, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States), of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and not having any office or place of business therein and composed in whole or in part of nonresident aliens, shall (except in the cases provided for in ~~sub~~ section (a) of this section and except as otherwise provided in regulations prescribed by the Commissioner under section 215) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 10 per centum thereof, except that such rate shall be reduced, in the case of a nonresident alien individual a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country:

\* \* \* \* \*

## SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

(a) *No United States Business or Office.*—

(1) *General Rule.*—There shall be levied, collected, and paid for each taxable year, in

lieu of the tax imposed by sections 11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 10 per centum of such amount, except that such rate shall be reduced, in the case of a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country. For inclusion in computation of tax of amount specified in shareholder's consent, see section 28.

(2) *Aggregate more than \$21,600.*—The tax imposed by paragraph (1) shall not apply to any individual if the aggregate amount received during the taxable year from the sources therein specified is more than \$21,600.

\* \* \* \* \*

(c) *No United States Business or Office and Gross Income of More Than \$21,600.*—A nonresident alien individual, not engaged in trade or business within the United States and not having an office or place of business therein who has a gross income for any taxable year of more than \$21,600 from the sources specified in subsection (a)(1), shall be taxable

without regard to the provisions of subsection (a)(1), except that—

(1) The gross income shall include only income from the sources specified in subsection (a)(1);

(3) The aggregate of the normal tax and surtax under sections 11 and 12 shall, in no case, be less than 10 per centum of the gross income from the sources specified in subsection (a)(1); and

## SEC. 212. GROSS INCOME.

(a) *General Rule.*—In the case of a non-resident alien individual gross income includes only the gross income from sources within the United States.

The corresponding sections of the Internal Revenue Code, which control the year 1941, are substantially the same, with the exceptions that the rate of withholding applicable to 1941, as specified in Section 143(b) of the Code, as amended by Section 5 of the Revenue Act of 1940, c. 419, 54 Stat. 516, and by Section 107 of the Revenue Act of 1941; c. 412, 55 Stat. 687, was 15% until September 29, 1941, and 27½% after that date; that the rate of tax on income of nonresident alien individuals received in 1941 specified in Section 211(a)(1) of the Code, as amended by Section 105 of the Revenue Act of 1941, *supra*, was 27½%, that the ag-



gregate amount of income specified in Section 211 (a) (2) and (c) of the Code, as amended by Section 105, Revenue Act of 1941, *supra*, was \$23,000 for the year 1941; and that the percentage figure in Section 211(c) (3) of the Code, as amended by Section 105(c) of the Revenue Act of 1941, *supra*, applicable to 1941 was 27½%.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

ART. 119-5. *Rentals and royalties.*—Gross income from sources within the United States includes rentals or royalties from property located within the United States or from any interest in such property, including rentals or royalties for the use of or the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property. The income arising from the rental of property, whether tangible or intangible, located within the United States, or from the use of property, whether tangible or intangible, within the United States, is from sources within the United States.

\* \* \* \* \*

ART. 143-2. *Fixed or determinable annual or periodical income.*—Only fixed or determinable annual or periodical income is subject to withholding. The Act specifically includes in such income, interest, dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations and emolu-

ments. But other kinds of income are included, as, for instance, royalties.

Income is fixed when it is to be paid in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the amount to be paid may be ascertained. The income need not be paid annually if it is paid periodically; that is to say, from time to time, whether or not at regular intervals. That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical. A salesman working by the month for a commission on sales which is paid or credited monthly receives determinable periodical income. The share of the income of an estate or trust from sources within the United States which is distributable, whether distributed or not, or which has been paid or credited during the taxable year to a nonresident alien beneficiary of such estate or trust constitutes fixed or determinable annual or periodical income within the meaning of section 143(b). The income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income. Such items as taxes, interest on mortgages, or premiums on insurance paid to or for the account of a nonresident alien landlord by a tenant, pursuant to the terms of the lease, constitute fixed or determinable annual or periodical income.

ART. 143-3. *Exemption from withholding.*— \* \* \*

\* \* \* \* \*

The following items of fixed or determinable annual or periodical income from sources within the United States received by a citizen of France residing in France, or a corporation organized under the laws of France, are not subject to the withholding provisions of the Revenue Act of 1938, since such income is exempt from Federal income tax under the provisions of the tax convention between the United States and France, signed April 27, 1932, and effective January 1, 1936 (see page 680 of the Appendix to these regulations):

(1) Amounts paid as consideration for the right to use patents, secret processes and formulas, trade-marks, and other analogous rights;

(2) Income received as copyright royalties; and

\* \* \* \* \*

ART. 211-7. *Taxation of nonresident alien individuals.*—For the purposes of this article and articles 212-1, 213-1, 214-1, and 217-2, nonresident alien individuals are divided into three classes: (1) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year, and deriving in the taxable year not more than \$21,600 gross amount of fixed or determinable annual or periodical in-

come from sources within the United States; (2) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year and deriving in the taxable year more than \$21,600 gross amount of fixed or determinable annual or periodical income from sources within the United States; and (3) nonresident alien individuals who at any time during the taxable year are engaged in trade or business in the United States or have an office or place of business therein.

(a) *No United States business or office—*

*General rule.*—A nonresident alien individual within class (1) referred to in the preceding paragraph is liable to the tax upon the amount received from sources within the United States, determined under the provisions of section 119, which is fixed or determinable annual or periodical gains, profits, and income.

For the purposes of section 211 (a), the term "amount received" means "gross income."

Specific items of fixed or determinable annual or periodical income are enumerated in the Act as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensation, remunerations and emoluments but other fixed or determinable annual or periodical gains, profits, and income are also subject to the tax, as, for instance, royalties. As to the determination of fixed or determinable annual or periodical income, see

article 143-2. The items of fixed or determinable annual or periodical income from sources within the United States received by a citizen of France residing in France which are exempt from Federal income taxation under the provisions of the tax convention between the United States and France signed April 27, 1932, and effective January 1, 1936 (see page 680 of the Appendix to these regulations), are described in article 143-3.

\* \* \* \*

Sections 19.119-5, 19.143-2, 19.143-3 and 19.211-7 of Treasury Regulations 103, promulgated under the Internal Revenue Code, are substantially the same as the above. T.D. 5011, 1940-2 Cum. Bull. 15, and T. D. 5086, 1941-2 Cum. Bull. 38, conformed Regulations 103 to the provisions of the Revenue Acts of 1940 and 1941, *supra*, in respect of the withholding rates, rate of tax on gross income, and aggregate gross income, applicable to 1941.



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# In the Supreme Court of the United States

OCTOBER TERM, 1948

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

PILHAM G. WOODHOUSE

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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# In the Supreme Court of the United States

OCTOBER TERM, 1948

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No. 84

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

PELHAM G. WODEHOUSE

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The opinion of the Tax Court (R. 14-28) is reported at 8 T.C. 637, and the opinion of the Court of Appeals (R. 90-98) is reported at 166 F. 2d 986.

### JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1948. (R. 98-99.) The petition for a writ of certiorari was filed June 9, 1948, and granted October 11, 1948. The jurisdiction of this Court rests upon 28 U.S.C., Sec. 1254.

## QUESTION PRESENTED

Whether payments made by publishers in the taxable years 1938 and 1941 for the serial rights in the United States and Canada, and in one instance for the book rights, to literary works of taxpayer, a nonresident alien, constitute taxable gross income within the meaning of Section 211 (a) (1) of the Revenue Act of 1938 and of the Internal Revenue Code.<sup>1</sup>

## STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Treasury Regulations are set forth in the Appendix, *infra*, pp. 61-69.

## STATEMENT

The facts found by the Tax Court material to the question presented are as follows:

The taxpayer, Mr. P. G. Wodehouse, is a British subject who formerly resided in France. During the taxable years 1938 and 1941 he was a nonresident alien. As a prolific and well-known writer of serials, plays, short stories, and other literary works, he has a wide reputation in the United States, and his works were accepted and published by various magazines. He sold his writings in the United States through one or more literary agents. (R. 15-16.)

On February 22, 1938, the Curtis Publishing Company (hereinafter referred to as "Curtis")

<sup>1</sup> If the decision below is reversed on this question, two other issues remain open for decision by the court below. (See fn. 7 and 8, *infra*, pp. 6-7.)

accepted for publication in the Saturday Evening Post an unpublished novel written by taxpayer entitled "The Cow-Creamer" (or "The Silver Cow") submitted to it by the Reynolds Agency, taxpayer's literary agent,<sup>2</sup> and sent its check for \$40,000 to the agent on that date. (R. 18.) The memorandum of acceptance provided in part as follows (R. 18-19):

This check is offered and accepted with the understanding that The Curtis Publishing Company buys all rights in and of all stories and special articles appearing in its publications and with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.

#### MOTION-PICTURE RIGHTS

Please note that our reservation of serial rights (which includes publication in one installment) includes new story versions based on motion-picture or dramatic scenarios of short stories and serials that have appeared in Curtis publications, and that we permit the use of such versions only under the following conditions: \* \* \* When selling motion-

<sup>2</sup> Paul R. Reynolds, a member of the Reynolds Agency, testified that the firm had been agents for taxpayer since approximately the First World War (R. 37.)

picture or dramatic rights of matter, you must notify the producer to this effect, so that there may be no misunderstanding on his part and no infringement of our rights.

The book publication rights to "The Cow-Creamer" were sold for \$5,000 to another publisher, Doubleday, Doran and Company. (R. 19.)

On December 13, 1938, Curtis accepted taxpayer's novel "Uncle Fred in the Springtime," subject to the same agreement of reassignment of rights as was contained in its acceptance of "The Cow-Creamer," and paid \$40,000 therefor to the Reynolds Agency. Both novels were published serially by Curtis in the Saturday Evening Post during 1939. (R. 19-20.)

On July 23, 1941, the Reynolds Agency sold to Hearst's "International-Cosmopolitan Magazine" (hereinafter called "Hearst's") for \$2,000 all the American and Canadian serial rights to an article entitled "My Years Behind Barbed Wire," written by taxpayer.<sup>3</sup> (R. 25.)

On August 12, 1941, the Reynolds Agency sold to Curtis for \$40,000 all the North American (including Canadian) serial rights to "Money in the Bank," a novel written by taxpayer.<sup>4</sup> (R. 25.)

<sup>3</sup> The agreement with Hearst's was stated in terms of a purchase by Hearst's of the serial rights (R. 79-80) rather than, as in the case of the transactions with Curtis, a transfer of all rights subject to reassignment of all rights other than the serial rights.

<sup>4</sup> Curtis' letter transmitting its check contained the same arrangement for reassignment of all rights except serial rights as in the case of "The Cow-Creamer." (R. 81-82)



The Reynolds Agency, as withholding agent, withheld from and paid the income tax on each of the lump sum payments received from the publishers and the payments were treated as taxable income by taxpayer and his wife, the wife having reported one-half of the 1938 payments by the publishers as her income under an assignment to her by taxpayer of one-half of his interest in "The Cow-Creamer" and "Uncle Fred in the Springtime."<sup>5</sup> After the Commissioner determined deficiencies in taxpay-

<sup>5</sup> As to the Tax Court's treatment of the payments as income, see R. 6, 8, 18, and 21-23.

In connection with the withholding of tax on the 1938 and 1941 payments, the Tax Court specifically found that, in accordance with taxpayer's assignments to his wife (R. 18), the Reynolds Agency remitted to taxpayer and his wife each the sum of \$17,100 after deducting commissions and taxes from the \$40,000 received from "The Cow-Creamer" and similarly sent taxpayer and his wife each \$17,000 to cover the proceeds of \$40,000, less charges, from "Uncle Fred in the Springtime" (R. 19). While the Tax Court did not mention the payment of income tax on the \$5,000 received by the Reynolds Agency from Doubleday, Doran and Company for the book publishing rights to "The Cow-Creamer" nor the payment of income tax on the total of \$42,000 received in 1941 from the two publishers, Hearst's and Curtis, for the serial rights to "My Years Behind Barbed Wire" and "Money in the Bank," the record shows that the Reynolds Agency also withheld and paid the income tax on such proceeds. Paul R. Reynolds, a member of the firm, testified as follows in answer to a question as to the arrangement for handling the funds received from the Saturday Evening Post, the Curtis publication (R. 36):

We collected the money, took our commission, retained any other charges, *withheld the non-resident alien income tax* and paid the proceeds to Mr. Wodehouse or to Mr. and Mrs., if the story was assigned to Mrs. [Italics supplied.]

The Commissioner's deficiency determinations also show that income tax had been withheld at source and paid in 1938 and 1941. (See R. 7, 9.)

er's income tax for years including 1938 and 1941, taxpayer filed a petition in the Tax Court which not only questioned the correctness of the bases of the Commissioner's deficiency determinations,<sup>6</sup> but sought refunds for overpayment of income tax (R. 14-15) on the ground that the payments received from the publishers through the Reynolds Agency were not subject to tax (R. 2).

The Tax Court held that the \$85,000 paid by Curtis and Doubleday, Doran and Company in 1938 for serial and book rights, respectively, to taxpayer's novels and the \$42,000 paid by Curtis and Hearst's in 1941 for serial rights represented advance royalties and that, as such, they were taxable as "other fixed or determinable annual or periodical gains" within the meaning of Section 211 (a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code. (R. 26.) The other issues in the case were also decided against taxpayer except as to his right to a deduction for attorneys' fees.<sup>7</sup>

<sup>6</sup> The Commissioner's deficiency determination for 1938 was based on a determination that \$40,250 (one-half of the gross proceeds from "The Cow-Creamer" and "Uncle Fred in the Springtime"), reported as income of taxpayer's wife, constituted taxable income to taxpayer. (R. 6.) For the year 1941 the Commissioner's deficiency determination was based on an increase in taxpayer's income from Doubleday, Doran and Company and on the disallowance of a deduction for attorneys' fees and of an exclusion from income of an amount treated by taxpayer as allocable to royalties earned outside the United States. (R. 8.)

<sup>7</sup> The Tax Court held that the anticipatory assignments by taxpayer to his wife of a one-half interest in the two novels "The Cow-Creamer" and "Uncle Fred in the Springtime"

On appeal the Court of Appeals, for the Fourth Circuit reversed the decision of the Tax Court on the main issue as to the taxability of the payments under Section 211 (a) (1) and did not decide the other issues.<sup>8</sup> Judge Dobie dissented on the ground that the decision of the Tax Court should be affirmed on the authority and reasoning of *Rohmer v. Commissioner*, 153 F. 2d 61 (C.C.A. 2d), certiorari denied, 328 U.S. 862. (R. 90-98.)

#### SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the payments made by publishers to taxpayer's United States literary agent in the taxable years 1938 and 1941 were and are to be treated as the proceeds from the sale of personal property and in failing to hold that the payments were and should be treated as advance royalties.

were not the result of a real donative intent and lacked reality and that therefore the payments made to taxpayer's wife in 1938 under the assignments were income of taxpayer; that, since the inclusion in taxpayer's income of the amounts paid to his wife concededly increased his income above the statutory 25 percent, the statute of limitations did not bar the assessment of an additional tax against taxpayer for 1938; and that no part of the payments made in 1938 and 1941 by the publishers constituted income from sources outside the United States so as to be excludible from taxpayer's gross income in those years. (R. 21-23, 26-27.)

<sup>8</sup> In the Court of Appeals taxpayer contended in the alternative that his assignments to his wife were effective to transfer to his wife one-half of the 1938 tax liability on the payments made by the publishers in 1938 and that at least 6 percent of the payments for both 1938 and 1941 should be excluded from his gross income as being allocable to sources outside of the United States. The Court of Appeals found it unnecessary to decide those issues in view of its holding that the 1938 and 1941 payments were not taxable at all. (R. 98.)

2. In holding that the payments were not "other fixed or determinable annual or periodical gains" within the meaning of Section 211 (a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code.

#### SUMMARY OF ARGUMENT

Taxpayer, a nonresident alien not engaged in trade or business in the United States, is taxable under Section 211 (a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code on the amount received as "interest \* \* \* dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income". Contrary to the decision below, which is in direct conflict with *Rohmer v. Commissioner*, 153 F. 2d 61 (C.C.A. 2d), certiorari denied, 328 U. S. 862, the italicized language covers lump sum royalties, and the payments made in 1938 and 1941 by United States publishers to taxpayer, through his United States literary agent, were lump sum royalties for the purposes of the statute.

1. Each payment made by the publishers was a lump sum royalty for a license. This necessarily follows from the fact that taxpayer, instead of granting his entire right, title and interest in each of the literary works involved and in the copyrights to be obtained on them, granted only the use of each literary work for a limited purpose—for magazine and newspaper publication (the serial



rights) and in one instance for book publication. Such a limited grant is a license and not a sale. While the grant of a limited right under a copyright may, in a broad sense, be characterized as a "sale", it is clear that it is not treated as such for the purposes of Section 211(a)(1).

In connection with the imposition and withholding of tax on the income of nonresident aliens, Section 119 of the Revenue Act of 1938 and of the Internal Revenue Code, which contains the same provisions as those for years contained in previous Revenue Acts, defines and classifies income from sources within the United States. The section separately covers gain from sales of property and "Rentals and royalties". The latter are covered by Section 119 (a)(4) and include rentals and royalties "for the use of or for the privilege of using in the United States \* \* \* copyrights \* \* \*". This language is sufficiently broad to cover not only payments for the use of copyrights *already* obtained by an author but payments made under arrangements, such as those with Curtis in the present case, for the use of the statutory copyright *to be* obtained by magazine publication. Moreover, Section 119 (a)(4) is not by its terms limited to royalties paid periodically. Thus, the Treasury Department ruled in 1933 that it covers lump sum payments for a limited right under a copyright, and in 1938 it was so held in



*Sabatini v. Commissioner*, 98 F. 2d 753 (C.C.A. 2d), which since then has consistently been followed with the exception of the decision below. The connection between the *Sabatini* decision involving Section 119 (a) (1) on the one hand and the identical coverage of Section 211 (a) (1) and the withholding provision on the other has been so apparent that tax on the payments made to taxpayer in the present case was withheld at the source in 1938 and 1941 by taxpayer's United States literary agent, as was tax on the payments involved in the *Rohmer* case. In addition, the legislative history of Section 211 (a) (1) shows that, in adopting the language of the withholding section as a definition of the income to be taxable after 1936 as to nonresident aliens not engaged in trade or business in this country, Congress did not intend to relieve such nonresident aliens of tax on "Rentals and royalties" as defined in Section 119 (a) (4).

2. The holding of the court below that the publishers' payments to taxpayer through his United States literary agent are not covered by Section 211 (a) (1), because being single sums they were not paid annually or periodically, violates established criteria of statutory interpretation. As this Court has stated, the intention of Congress is to be ascertained not by taking a word or clause from its setting and viewing it apart, but by considering it in connection with its context, the general purposes

of the statute in which it is found, and the occasion and circumstances of its use.

The language of Section 211 (a) (1) itself shows that it is not limited in its coverage to payments which are made annually or periodically. The statute taxes the amount received from sources within the United States as interest, rent, compensation, etc., "or other fixed or determinable annual or periodical gains, profits, and income." Under the familiar rule of *ejusdem generis* the quoted general language means income of the same type as those categories of income specifically mentioned, and the statute thus defines the nature or type of income taxed, regardless of the manner of payment. The House and Senate reports in connection with the original enactment of Section 211 (a) (1), the language of which was adopted from the withholding at source provision which had been in effect as to nonresident aliens since 1917, not only so interpreted the statute but attached no significance to the words "annual or periodical" except as perhaps making it more clear that the statute did not cover gain from the sale of property, the general language of the statute quoted above being interpreted as meaning "other fixed and determinable income" and "other fixed and determinable income (not including capital gains)." It is also evident that as far back as 1917 and through all the intervening years Congress attached no importance to the words "annual or

periodical," for the information at source provision as to citizens has since 1917 covered the very same categories of income specifically mentioned in Section 211 (a) (1), with the exception of dividends added in 1936, and "other *fixed or determinable* gains, profits, and income" while at the same time, since 1917, the provision for withholding at source has covered the same specified categories of income and "other *fixed or determinable annual or periodical* gains, profits, and income." The two general phrases were used interchangeably in a legislative report in 1918 referring to the two statutes.

The court below was plainly in error in thinking that an interpretation of Section 211 (a) (1) in accordance with the legislative materials would amount to an excision of the words "annual or periodical". In adopting its own interpretation of the words "annual or periodical" as meaning "paid annually or periodically", the court below took the words "annual or periodical" from their context and failed to recognize that, since the whole phrase "fixed or determinable annual or periodical gains, profits, and income" is merely descriptive of the categories of income *specifically* listed, it is immaterial whether those categories of income are described as "fixed or determinable" income or as "fixed or determinable annual or periodical" income. It is still "other" income of the same type which is covered under the general phrase "other

fixed or determinable annual or periodical gains, profits, and income."

Section 211 (a) (1), properly construed, clearly covers lump sum royalties, including those involved in the present case. Congress plainly regarded the specified categories of income as being of the "fixed or determinable" type, exclusive of capital gains, and lump sum royalties are income of the quoted type, being wholly income when paid. Further, the legislative purpose in enacting the statute in 1936, as shown by the House and Senate reports, was, so far as pertinent here (aside from the collection of additional revenue), simply to relieve nonresident aliens not engaged in trade or business in this country of tax on capital gains which it had been found administratively impossible in most cases to collect effectually and, since Section 119 draws a distinction between "Rentals and royalties" and gain from the sale of property, Congress must have intended that nonresident aliens not engaged in trade or business in this country should remain taxable on "Rentals and royalties" as defined in Section 119 (a) (4), which includes the lump sum royalties received by taxpayer. Moreover, the reason for the exemption of tax on gain from the sale of property—the impossibility in most cases of collecting the tax effectually—is one which cannot be related to lump sum royalties for the use of a copyright, which are wholly income when paid and easily collectible

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1947

\_\_\_\_\_  
No.  
\_\_\_\_\_

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*

V.

\_\_\_\_\_  
PELHAM G. WODEHOUSE

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

\_\_\_\_\_  
The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in this case.

**OPINIONS BELOW**

The opinion of the Tax Court (R. 14-28) is reported at 8 T.C. 637 and the opinion of the Circuit

Court of Appeals (R. 90-98) is reported at 166 F. 2d 986.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 16, 1948. (R. 98-99.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Whether payments made by publishers in the taxable years 1938 and 1941 for the serial rights in the United States and Canada, and in one instance for the book rights, to taxpayer's literary works constitute taxable gross income within the meaning of Section 211(a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code.

### STATUTES AND REGULATIONS INVOLVED

The applicable statutes and Treasury Regulations are set forth in the Appendix, *infra*, pp. 12-20.

### STATEMENT

The facts found by the Tax Court material to the question presented are as follows:

The taxpayer is a British subject who formerly resided in France. During the taxable years 1938 and 1941 he was a nonresident alien. As a prolific and well known writer of serials, plays, short stories, and other literary works, he has a wide reputation in the United States, and his works were

accepted and published by various magazines. He sold his writings in the United States through literary agents. (R. 15-16.)

On February 22, 1938, the Curtis Publishing Company (hereinafter referred to as "Curtis") accepted for publication in the Saturday Evening Post an unpublished novel entitled "The Cow-Creamer" (or "The Silver Cow"), submitted to it by taxpayer's agent, and sent its check for \$40,000 to the agent on that date. (R. 18.) The memorandum of acceptance provided in part as follows (R. 18-19):

This check is offered and accepted with the understanding that The Curtis Publishing Company buys all rights in and of all stories and special articles appearing in its publications and with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.

The book publication rights to "The Cow-Creamer" were sold for \$5,000 to another publisher, Doubleday, Doran and Company. (R. 19.)

On December 13, 1938, Curtis accepted taxpayer's novel "Uncle Fred in the Springtime", subject to the same agreement of reassignment of rights as was contained in its acceptance of "The

Cow-Creamer", and paid \$40,000 therefor. Both novels were published serially by Curtis during 1939. (R. 19-20.)

On July 23, 1941, taxpayer's agent sold to Hearst's International-Cosmopolitan Magazine for \$2,000 all the American and Canadian serial rights to an article entitled "My Years Behind Barbed Wire" written by taxpayer. (R. 25.)

On August 12, 1941, taxpayer's agent sold to Curtis for \$40,000 all the North American (including Canadian) serial rights to "Money in the Bank", a novel written by taxpayer.<sup>1</sup> (R. 25.)

On these facts the Tax Court held that the \$85,000 paid by Curtis and Doubleday, Doran and Company in 1938 for serial and book rights, respectively, to taxpayer's novels and the \$42,000 paid by Curtis and Hearst's Magazine in 1941 for serial rights to taxpayer's writings represented advance royalties and that, as such, they were "other fixed or determinable annual or periodical gains" within the meaning of Section 211(a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code, with the result that they constitute taxable gross income of taxpayer as a nonresident alien in those years." (R. 26.)

<sup>1</sup> Curtis' letter transmitting its check contained the same arrangement for reassignment of all rights except serial rights as in the case of "The Cow-Creamer". (R. 81-82.)

<sup>2</sup> The Tax Court also decided that the anticipatory assignments by taxpayer to his wife of a one-half interest in the two novels "The Cow-Creamer" and "Uncle Fred in the

On appeal the Circuit Court of Appeals for the Fourth Circuit reversed the decision of the Tax Court. The reversal was based on two grounds— (1) that the lump sum payments constituted the proceeds from sales of personal property and (2) that the payments were not in any event covered by Section 211(a) (1), because they were not “annual or periodical.” Judge Dobie dissented, stating that he thought the decision of the Tax Court should be affirmed on the authority and reasoning of *Rohmer v. Commissioner*, 153 F. 2d 61 (C.C.A. 2d), certiorari denied, 328 U.S. 862. (R. 90-98.)

#### **SPECIFICATION OF ERRORS TO BE URGED**

The Circuit Court of Appeals erred:

1. In holding that the payments made by publishers to taxpayer's United States literary agent in the taxable years were and are to be treated as the proceeds from the sale of personal property

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Springtime” were not the result of a real donative intent and lacked reality; that the royalties paid to taxpayer's wife in 1938 under these assignments were income of taxpayer; and that the statute of limitations did not bar the assessment of an additional tax for 1938. (R. 21-23.) Finally, it held that no part of the royalties paid in 1938 and 1941 by the publishers constituted income from sources outside the United States so as to be excludable from taxpayer's gross income in those years. (R. 23, 26-27.) These subsidiary holdings of the Tax Court were not passed upon by the Circuit Court of Appeals, because of its decision on the main issue that none of the payments by publishers in 1938 and 1941 were taxable income to taxpayer. Accordingly, these subsidiary questions are not presented in this petition for certiorari.



and in failing to hold that the payments were and should be treated as advance royalties.

2. In holding that the payments were not "other fixed or determinable annual or periodical gains" within the meaning of Section 211(a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code.

#### REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Rohmer v. Commissioner*, 153 F. 2d 61, certiorari denied, 328 U.S. 862. Both cases involved the question whether a non-resident alien author is taxable on lump sums paid by a United States publisher to the author's United States literary agent for limited rights to one or more stories written by the author, the other rights in the stories being retained by the author.<sup>3</sup> The answer de-

<sup>3</sup> There was a slight difference in the form in which the transactions in the two cases were cast. In the *Rohmer* case an endorsement on the checks submitted in payment specified what rights were conferred on the publisher, which included the serial rights [meaning the right to magazine and newspaper publication in serial form] and the authority to copy-right, and stated that there was to be no prior publication anywhere in the world except by special written agreement and no book publication before magazine publication was completed. See R. 13, *Rohmer v. Commissioner*, No. 1151, October Term, 1945. In the present case lump sum payments for the serial rights were made under a memorandum of acceptance which provided as follows (R. 18, 19):

depends upon whether such lump sum payments are advance royalties and whether, as such, they constitute "other fixed or determinable annual or periodical gains, profits, and income" within the meaning of Section 211(a)(1) of the Internal Revenue Code and the corresponding provision of the Revenue Act of 1938 (Appendix, *infra*, pp. 13-14) which requires non-resident aliens to pay income tax on amounts received "as interest \* \* \*, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income." In both the *Rohmer* case and the instant case the taxpayers argued that (1) the lump sum payments were received as the proceeds from the sale of personal property and thus were not taxable for that reason and that (2) the payments, even if advance royalties, were not in any event covered by the statute because they were paid in lump sums rather than annually.

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This check is offered and accepted with the understanding that The Curtis Publishing Company buys all rights in and of all stories and special articles appearing in its publications and with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.

The Circuit Court of Appeals for the Fourth Circuit did not, however, attempt to distinguish the *Rohmer* case on the basis of this difference in the form of the transactions involved.

or periodically. In the *Rohmer* case the Circuit Court of Appeals for the Second Circuit stated that it could not agree that the payments were the proceeds from the sale of personal property rather than advance royalties (153 F. 2d at p. 63), whereas in the present case the Circuit Court of Appeals for the Fourth Circuit held that the payments did constitute the proceeds from the sale of personal property (R. 93-95). In answer to the second contention of the taxpayers in the two cases, the Circuit Court of Appeals for the Second Circuit held in the *Rohmer* case that the phrase "other fixed or determinable annual or periodical gains, profits, and income" is "descriptive of the nature or type of income, regardless of the actual manner of payment" and covers advance royalties (153 F. 2d at p. 63), whereas the Circuit Court of Appeals for the Fourth Circuit in the instant case flatly rejected the Second Circuit's interpretation of the statutory language (R. 96-97) and held that the payments did not answer the statutory description of "annual or periodical" gains (R. 95-96), the theory of the court below apparently being that the statute covers only payments which are actually paid, or perhaps those which accrue, annually or periodically.<sup>4</sup> The conflict in the two de-

<sup>4</sup> While the court below rejected the interpretation of the statute adopted by the Second Circuit in the *Rohmer* case, it is not entirely clear what interpretation the court below would substitute for the Second Circuit's interpretation. On the one hand the opinion below appears to hold that the language

cisions is direct and clear-cut, as the court below recognized by its statement (R. 92) that it was unable to adopt the conclusions reached in the *Rohmer* case.

2. The decision below raises an important question which should be settled by this Court. Previously it had appeared to be sufficiently established that lump sum payments for the grant of limited rights, such as movie or serial rights, in a literary work of a non-resident alien were to be treated as advance royalties (See *Sabdtini v. Commissioner*, 98 F. 2d 753 (C.C.A. 2d); *Rohmer v. Commissioner*, *supra*) and in both the *Rohmer* case and the present case the tax on the lump sum

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"other fixed or determinable annual or periodical gains, profits, and income" covers only amounts which are actually paid annually or periodically (see R. 95-96) but, on the other hand, the court states as follows in a footnote (R. 95):

It is not meant to say that a lump sum payment is never subject to taxation under the statute. For example, it was held in *Commissioner v. Raphael*, 9 Cir., 133 F. 2d 442 [certiorari denied, 320 U. S. 735], that interest on a judgment which was paid in a lump sum was taxable under the section because the gain involved was periodical but such a ruling can have no bearing upon a single payment which is in no way related to the period in which the right is exercised or to the contingency of subsequent performance.

This, together with the statement that "The section does not tax all payments or all royalties but only those which are 'fixed or determinable annual or periodical'" (R. 96), suggests that the court below interpreted the statute as taxing only royalties which are based on a percentage of sales or

payments was withheld and paid by the author's United States agent pursuant to Section 143(b) of the Internal Revenue Code or of the Revenue Act of 1938 (Appendix, *infra*, pp. 12-13), both of which require the deduction and withholding of tax on the identical income upon which Section 211(a)(1) imposes a tax. The decision below, holding that such lump sum payments are not to be treated as advance royalties and are not taxable, introduces confusion in respect of the coverage of both the taxing and withholding section and, because identical language is used in the two sections, affects withholding agents in all jurisdictions of the country. The confusion is increased

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profits, etc., that is, those royalties which are earned or accrue annually or periodically.

It will be noted that both of the two possible interpretations adopted by the court below are repugnant to the plain language of the statute. Since amounts paid as interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments are specifically covered, the phrase "or other fixed or determinable annual or periodical gains, profits, and income" must relate to income of the same type, not to the manner of payment. And, since some of the designated categories of income, such as compensations, remunerations and emoluments, are not only susceptible of lump sum payment but are not necessarily earned and do not necessarily accrue annually or periodically, the only logical interpretation of the statute is that it taxes all types of income which are fixed or determinable and are usually, but not necessarily, paid annually or periodically. Such an interpretation is consistent with the legislative history of the statutory language and with the pertinent decisions, as we showed in our Brief in Opposition in the *Rohmer* case, No. 1151, October Term, 1945.



By the failure of the court below to interpret the taxing section affirmatively, as distinguished from negatively. On the one hand, the decision holds that lump sum payments for the grant of limited rights in a literary work of a non-resident alien are exempt from tax as constituting the proceeds of a sale and, on the other hand, implies that periodic payments for the grant of the same limited rights might constitute royalties and be taxable. Further, the decision, by reason of its ultimate holding, also would confer upon non-resident aliens a tax advantage not enjoyed by authors who are citizens of the United States, the income from the writings of citizen authors engaged in the business of writing being subject to tax as ordinary income rather than as capital gain from the sale of property (*Goldsmith v. Commissioner*, 143 F. 2d 466 (C.C.A. 2d), certiorari denied, 323 U.S. 774). It is therefore important that this Court resolve the confusion resulting from the decision below and at the same time determine whether Congress intended to confer upon non-resident aliens the tax advantage and convenient means of tax avoidance reflected by the result reached below.

### CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,  
Solicitor General.

June, 1948.

## APPENDIX

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 119. INCOME FROM SOURCES  
WITHIN UNITED STATES.

(a) *Gross Income from Sources in United States.*—The following items of gross income shall be treated as income from sources within the United States:

(4) *Rentals and royalties.*—Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, goodwill, trade-marks, trade brands, franchises, and other like property; and

(5) *Sale of real property.*—Gains, profits, and income from the sale of real property located in the United States.

(6) *Sale of personal property.*—For gains, profits, and income from the sale of personal property, see subsection (e).

SEC. 143. WITHHOLDING OF TAX AT  
SOURCE.

(b) *Nonresident Aliens.*—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the con-

trol; receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States), of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and not having any office or place of business therein and composed in whole or in part of nonresident aliens, shall (except in the cases provided for in subsection (a) of this section and except as otherwise provided in regulations prescribed by the Commissioner under section 215), deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 10 per centum thereof, except that such rate shall be reduced, in the case of a nonresident alien individual a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country:

\* \* \* \* \*

## SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

(a) *No United States Business or Office.*—

(1) *General Rule.*—There shall be levied, collected, and paid for each taxable year, in

lieu of the tax imposed by sections 11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 10 per centum of such amount, except that such rate shall be reduced, in the case of a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country. For inclusion in computation of tax of amount specified in shareholder's consent, see section 28.

(2) *Aggregate more than \$21,600.*—The tax imposed by paragraph (1) shall not apply to any individual if the aggregate amount received during the taxable year from the sources therein specified is more than \$21,600.

\* \* \* \* \*

(c) *No United States Business or Office and Gross Income of More Than \$21,600.*—A nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein who has a gross income for any taxable year of more than \$21,600 from the sources specified in subsection (a)(1), shall be taxable

without regard to the provisions of subsection (a)(1), except that—

(1) The gross income shall include only income from the sources specified in subsection (a)(1);

(3) The aggregate of the normal tax and surtax under sections 11 and 12 shall, in no case, be less than 10 per centum of the gross income from the sources specified in subsection (a)(1); and

## SEC. 212. GROSS INCOME.

(a) *General Rule.*—In the case of a non-resident alien individual gross income includes only the gross income from sources within the United States.

The corresponding sections of the Internal Revenue Code, which control the year 1941, are substantially the same, with the exceptions that the rate of withholding applicable to 1941, as specified in Section 143(b) of the Code, as amended by Section 5 of the Revenue Act of 1940, c. 419, 54 Stat. 516, and by Section 107 of the Revenue Act of 1941, c. 412, 55 Stat. 687, was 15% until September 29, 1941, and 27½% after that date; that the rate of tax on income of nonresident alien individuals received in 1941 specified in Section 211(a)(1) of the Code, as amended by Section 105 of the Revenue Act of 1941, *supra*, was 27½%, that the ag-



gregate amount of income specified in Section 211 (a)(2) and (c) of the Code, as amended by Section 105, Revenue Act of 1941, *supra*, was \$23,000 for the year 1941; and that the percentage figure in Section 211(c)(3) of the Code, as amended by Section 105(c) of the Revenue Act of 1941, *supra*, applicable to 1941 was 27½%.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

ART. 119-5. *Rentals and royalties.*—Gross income from sources within the United States includes rentals or royalties from property located within the United States or from any interest in such property, including rentals or royalties for the use of or the privilege of using in the United States, patents, copy rights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other like property. The income arising from the rental of property, whether tangible or intangible, located within the United States, or from the use of property, whether tangible or intangible, within the United States, is from sources within the United States.

ART. 143-2. *Fixed or determinable annual or periodical income.*—Only fixed or determinable annual or periodical income is subject to withholding. The Act specifically includes in such income, interest, dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations and emolu-

ments. But other kinds of income are included, as, for instance, royalties.

Income is fixed when it is to be paid in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the amount to be paid may be ascertained. The income need not be paid annually if it is paid periodically; that is to say, from time to time, whether or not at regular intervals. That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical. A salesman working by the month for a commission on sales which is paid or credited monthly receives determinable periodical income. The share of the income of an estate or trust from sources within the United States which is distributable, whether distributed or not, or which has been paid or credited during the taxable year to a nonresident alien beneficiary of such estate or trust constitutes fixed or determinable annual or periodical income within the meaning of section 143(b). The income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income. Such items as taxes, interest on mortgages, or premiums on insurance paid to or for the account of a nonresident alien landlord by a tenant, pursuant to the terms of the lease, constitute fixed or determinable annual or periodical income.

ART. 143-3. *Exemption from withhold-*  
*ing.*—\*\*\*

\* \* \* \* \*

The following items of fixed or determinable annual or periodical income from sources within the United States received by a citizen of France residing in France, or a corporation organized under the laws of France, are not subject to the withholding provisions of the Revenue Act of 1938, since such income is exempt from Federal income tax under the provisions of the tax convention between the United States and France, signed April 27, 1932, and effective January 1, 1936 (see page 680 of the Appendix to these regulations):

(1) Amounts paid as consideration for the right to use patents, secret processes and formulas, trade-marks, and other analogous rights;

(2) Income received as copyright royalties;  
 and

\* \* \* \* \*

ART. 211-7. *Taxation of nonresident alien individuals.*—For the purposes of this article and articles 212-1, 213-1, 214-1, and 217-2, nonresident alien individuals are divided into three classes: (1) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year, and deriving in the taxable year not more than \$21,600 gross amount of fixed or determinable annual or periodical in-

come from sources within the United States; (2) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year and deriving in the taxable year more than \$21,600 gross amount of fixed or determinable annual or periodical income from sources within the United States; and (3) nonresident alien individuals who at any time during the taxable year are engaged in trade or business in the United States or have an office or place of business therein.

(a) *No United States business or office—General rule.*—A nonresident alien individual within class (1) referred to in the preceding paragraph is liable to the tax upon the amount received from sources within the United States, determined under the provisions of section 119, which is fixed or determinable annual or periodical gains, profits, and income. For the purposes of section 211 (a), the term "amount received" means "gross income." Specific items of fixed or determinable annual or periodical income are enumerated in the Act as interest (except interest on deposits with persons carrying on the banking business); dividends, rents, salaries, wages, premiums, annuities, compensation, remunerations and emoluments but other fixed or determinable annual or periodical gains, profits, and income are also subject to the tax, as, for instance, royalties. As to the determination of fixed or determinable annual or periodical income, see

article 143-2. The items of fixed or determinable annual or periodical income from sources within the United States received by a citizen of France residing in France which are exempt from Federal income taxation under the provisions of the tax convention between the United States and France signed April 27, 1932, and effective January 1, 1936, (see page 680 of the Appendix to these regulations), are described in article 143-3.

\* \* \* \* \*

Sections 19.119-5, 19.143-2, 19.143-3 and 19.211-7 of Treasury Regulations 103, promulgated under the Internal Revenue Code, are substantially the same as the above. T.D. 5011, 1940-2 Cum. Bull. 15, and T. D. 5086, 1941-2 Cum. Bull. 38, conformed Regulations 103 to the provisions of the Revenue Acts of 1940 and 1941, *supra*, in respect of the withholding rates, rate of tax on gross income, and aggregate gross income, applicable to 1941.





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Argument	

The amounts paid by publishers in 1938 and 1941 to taxpayer through his literary agent constitute taxable gross income under Section 211 (a) (1) of the Revenue Act of 1938 and of the Internal Revenue Code.

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A. For the purposes of Section 211(a) (1), the agreements between the publishers and taxpayer's literary agent were licenses for the limited use of taxpayer's writings, not sales of personal property, and the amounts paid therefor lump sum royalties.

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B. The phrase "other fixed or determinable annual or periodical gains, profits, and income" contained in Section 211(a) (1) defines the nature or type of income taxed and includes lump sum royalties.

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# In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 84

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

PELHAM G. WODEHOUSE

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The opinion of the Tax Court (R. 14-28) is reported at 8 T.C. 637, and the opinion of the Court of Appeals (R. 90-98) is reported at 166 F. 2d 986.

### JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1948. (R. 98-99.) The petition for a writ of certiorari was filed June 9, 1948, and granted October 11, 1948. The jurisdiction of this Court rests upon 28 U.S.C., Sec. 1254.

## QUESTION PRESENTED

Whether payments made by publishers in the taxable years 1938 and 1941 for the serial rights in the United States and Canada, and in one instance for the book rights, to literary works of taxpayer, a nonresident alien, constitute taxable gross income within the meaning of Section 211 (a) (1) of the Revenue Act of 1938 and of the Internal Revenue Code.<sup>1</sup>

## STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Treasury Regulations are set forth in the Appendix, *infra*, pp. 61-69.

## STATEMENT

The facts found by the Tax Court material to the question presented are as follows:

The taxpayer, Mr. P. G. Wodehouse, is a British subject who formerly resided in France. During the taxable years 1938 and 1941 he was a nonresident alien. As a prolific and well-known writer of serials, plays, short stories, and other literary works, he has a wide reputation in the United States, and his works were accepted and published by various magazines. He sold his writings in the United States through one or more literary agents. (R. 15-16.)

On February 22, 1938, the Curtis Publishing Company (hereinafter referred to as "Curtis")

<sup>1</sup> If the decision below is reversed on this question, two other issues remain open for decision by the court below. (See fn. 7 and 8, *infra*, pp. 6-7.)

accepted for publication in the Saturday Evening Post an unpublished novel written by taxpayer entitled "The Cow-Creamer" (or "The Silver Cow") submitted to it by the Reynolds Agency, taxpayer's literary agent,<sup>2</sup> and sent its check for \$40,000 to the agent on that date. (R. 18.) The memorandum of acceptance provided in part as follows (R. 18-19):

This check is offered and accepted with the understanding that The Curtis Publishing Company buys all rights in and of all stories and special articles appearing in its publications and with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.

#### MOTION-PICTURE RIGHTS

Please note that our reservation of serial rights (which includes publication in one installment) includes new story versions based on motion-picture or dramatic scenarios of short stories and serials that have appeared in Curtis publications, and that we permit the use of such versions only under the following conditions: \* \* \* When selling motion-

<sup>2</sup> Paul R. Reynolds, a member of the Reynolds Agency, testified that the firm had been agents for taxpayer since approximately the First World War (R. 37.)

picture or dramatic rights of matter, you must notify the producer to this effect, so that there may be no misunderstanding on his part and no infringement of our rights.

The book publication rights to "The Cow-Creamer" were sold for \$5,000 to another publisher, Doubleday, Doran and Company. (R. 19.)

On December 13, 1938, Curtis accepted taxpayer's novel "Uncle Fred in the Springtime," subject to the same agreement of reassignment of rights as was contained in its acceptance of "The Cow-Creamer," and paid \$40,000 therefor to the Reynolds Agency. Both novels were published serially by Curtis in the Saturday Evening Post during 1939. (R. 19-20.)

On July 23, 1941, the Reynolds Agency sold to Hearst's International-Cosmopolitan Magazine (hereinafter called "Hearst's") for \$2,000 all the American and Canadian serial rights to an article entitled "My Years Behind Barbed Wire," written by taxpayer.<sup>3</sup> (R. 25.)

On August 12, 1941, the Reynolds Agency sold to Curtis for \$40,000 all the North American (including Canadian) serial rights to "Money in the Bank," a novel written by taxpayer.<sup>4</sup> (R. 25.)

<sup>3</sup> The agreement with Hearst's was stated in terms of a purchase by Hearst's of the serial rights (R. 79-80) rather than, as in the case of the transactions with Curtis, a transfer of all rights subject to reassignment of all rights other than the serial rights.

<sup>4</sup> Curtis' letter transmitting its check contained the same arrangement for reassignment of all rights except serial rights as in the case of "The Cow-Creamer." (R. 81-82.)



The Reynolds Agency, as withholding agent, withheld from and paid the income tax on each of the lump sum payments received from the publishers and the payments were treated as taxable income by taxpayer and his wife, the wife having reported one-half of the 1938 payments by the publishers as her income under an assignment to her by taxpayer of one-half of his interest in "The Cow-Creamer" and "Uncle Fred in the Springtime."<sup>5</sup> After the Commissioner determined deficiencies in taxpay-

<sup>5</sup> As to the Tax Court's treatment of the payments as income, see R. 6, 8, 18, and 21-23.

In connection with the withholding of tax on the 1938 and 1941 payments, the Tax Court specifically found that, in accordance with taxpayer's assignments to his wife (R. 18), the Reynolds Agency remitted to taxpayer and his wife each the sum of \$17,100 after deducting commissions and taxes from the \$40,000 received from "The Cow-Creamer" and similarly sent taxpayer and his wife each \$17,000 to cover the proceeds of \$40,000, less charges, from "Uncle Fred in the Springtime" (R. 19). While the Tax Court did not mention the payment of income tax on the \$5,000 received by the Reynolds Agency from Doubleday, Doran and Company for the book publishing rights to "The Cow-Creamer" nor the payment of income tax on the total of \$42,000 received in 1941 from the two publishers, Hearst's and Curtis, for the serial rights to "My Years Behind Barbed Wire" and "Money in the Bank," the record shows that the Reynolds Agency also withheld and paid the income tax on such proceeds. Paul R. Reynolds, a member of the firm, testified as follows in answer to a question as to the arrangement for handling the funds received from the Saturday Evening Post, the Curtis publication (R. 36):

We collected the money, took our commission, retained any other charges, *withheld the non-resident alien income tax* and paid the proceeds to Mr. Wodehouse or to Mr. and Mrs., if the story was assigned to Mrs. [Italics supplied.]

The Commissioner's deficiency determinations also show that income tax had been withheld at source and paid in 1938 and 1941. (See R. 7, 9.)

er's income tax for years including 1938 and 1941, taxpayer filed a petition in the Tax Court which not only questioned the correctness of the bases of the Commissioner's deficiency determinations,<sup>6</sup> but sought refunds for overpayment of income tax (R. 14-15) on the ground that the payments received from the publishers through the Reynolds Agency were not subject to tax (R. 2).

The Tax Court held that the \$85,000 paid by Curtis and Doubleday, Doran and Company in 1938 for serial and book rights, respectively, to taxpayer's novels and the \$42,000 paid by Curtis and Hearst's in 1941 for serial rights represented advance royalties and that, as such, they were taxable as "other fixed or determinable annual or periodical gains" within the meaning of Section 211 (a) (1) of the Revenue Act of 1938 and of the Internal Revenue Code. (R. 26.) The other issues in the case were also decided against taxpayer except as to his right to a deduction for attorneys' fees.<sup>7</sup>

<sup>6</sup> The Commissioner's deficiency determination for 1938 was based on a determination that \$40,250 (one-half of the gross proceeds from "The Cow-Creamer" and "Uncle Fred in the Springtime"), reported as income of taxpayer's wife, constituted taxable income to taxpayer. (R. 6.) For the year 1941 the Commissioner's deficiency determination was based on an increase in taxpayer's income from Doubleday, Doran and Company and on the disallowance of a deduction for attorneys' fees and of an exclusion from income of an amount treated by taxpayer as allocable to royalties earned outside the United States. (R. 8.)

<sup>7</sup> The Tax Court held that the anticipatory assignments by taxpayer to his wife of a one-half interest in the two novels "The Cow-Creamer" and "Uncle Fred in the Springtime"

On appeal the Court of Appeals for the Fourth Circuit reversed the decision of the Tax Court on the main issue as to the taxability of the payments under Section 211 (a)(1) and did not decide the other issues.<sup>8</sup> Judge Dobie dissented on the ground that the decision of the Tax Court should be affirmed on the authority and reasoning of *Rohmer v. Commissioner*, 153 F. 2d 61 (C.C.A. 2d), certiorari denied, 328 U.S. 862. (R. 90-98.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the payments made by publishers to taxpayer's United States literary agent in the taxable years 1938 and 1941 were and are to be treated as the proceeds from the sale of personal property and in failing to hold that the payments were and should be treated as advance royalties.

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were not the result of a real donative intent and lacked reality and that therefore the payments made to taxpayer's wife in 1938 under the assignments were income of taxpayer; that, were the inclusion in taxpayer's income of the amounts paid to his wife concededly increased his income above the statutory 25 percent, the statute of limitations did not bar the assessment of an additional tax against taxpayer for 1938; and that no part of the payments made in 1938 and 1941 by the publishers constituted income from sources outside the United States so as to be excludible from taxpayer's gross income in those years. (R. 21-23, 26-27.)

<sup>8</sup> In the Court of Appeals taxpayer contended in the alternative that his assignments to his wife were effective to transfer to his wife one-half of the 1938 tax liability on the payments made by the publishers in 1938 and that at least 6 percent of the payments for both 1938 and 1941 should be excluded from his gross income as being allocable to sources outside of the United States. The Court of Appeals found it unnecessary to decide those issues in view of its holding that the 1938 and 1941 payments were not taxable at all. (R. 98.)

2. In holding that the payments were not "other fixed or determinable annual or periodical gains" within the meaning of Section 211 (a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code.

#### SUMMARY OF ARGUMENT

Taxpayer, a nonresident alien not engaged in trade or business in the United States, is taxable under Section 211 (a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code on the amount received as "interest \* \* \* dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income". Contrary to the decision below, which is in direct conflict with *Rohmer v. Commissioner*, 153 F. 2d 61 (C.C.A. 2d), certiorari denied, 328 U.S. 862, the italicized language covers lump sum royalties, and the payments made in 1938 and 1941 by United States publishers to taxpayer, through his United States literary agent, were lump sum royalties for the purposes of the statute.

1. Each payment made by the publishers was a lump sum royalty for a license. This necessarily follows from the fact that taxpayer, instead of granting his entire right, title and interest in each of the literary works involved and in the copyrights to be obtained on them, granted only the use of each literary work for a limited purpose—for magazine and newspaper publication (the serial

rights) and in one instance for book publication. Such a limited grant is a license and not a sale. While the grant of a limited right under a copyright may, in a broad sense, be characterized as a "sale", it is clear that it is not treated as such for the purposes of Section 211(a)(1).

In connection with the imposition and withholding of tax on the income of nonresident aliens, Section 119 of the Revenue Act of 1938 and of the Internal Revenue Code, which contains the same provisions as those for years contained in previous Revenue Acts, defines and classifies income from sources within the United States. The section separately covers gain from sales of property and "Rentals and royalties". The latter are covered by Section 119 (a)(4) and include rentals and royalties "for the use of or for the privilege of using in the United States \* \* \* copyrights \* \* \*". This language is sufficiently broad to cover not only payments for the use of copyrights *already* obtained by an author but payments made under arrangements, such as those with Curtis in the present case, for the use of the statutory copyright *to be* obtained by magazine publication. Moreover, Section 119 (a)(4) is not by its terms limited to royalties paid periodically. Thus, the Treasury Department ruled in 1933, that it covers lump sum payments for a limited right under a copyright, and in 1938 it was so held in



*Sabatini v. Commissioner*, 98 F. 2d 753 (C.C.A. 2d), which since then has consistently been followed with the exception of the decision below. The connection between the *Sabatini* decision involving Section 119 (a) (1) on the one hand and the identical coverage of Section 211 (a) (1) and the withholding provision on the other has been so apparent that tax on the payments made to taxpayer in the present case was withheld at the source in 1938 and 1941 by taxpayer's United States literary agent, as was tax on the payments involved in the *Rohmer* case. In addition, the legislative history of Section 211 (a) (1) shows that, in adopting the language of the withholding section as a definition of the income to be taxable after 1936 as to nonresident aliens not engaged in trade or business in this country, Congress did not intend to relieve such nonresident aliens of tax on "Rentals and royalties" as defined in Section 119 (a) (4).

2. The holding of the court below that the publishers' payments to taxpayer through his United States literary agent are not covered by Section 211 (a) (1), because being single sums they were not paid annually or periodically, violates established criteria of statutory interpretation. As this Court has stated, the intention of Congress is to be ascertained, not by taking a word or clause from its setting and viewing it apart, but by considering it in connection with its context, the general purposes

of the statute in which it is found, and the occasion and circumstances of its use.

The language of Section 211 (a) (1) itself shows that it is not limited in its coverage to payments which are made annually or periodically. The statute taxes the amount received from sources within the United States as interest, rent, compensation, etc., "or other fixed or determinable annual or periodical gains, profits, and income." Under the familiar rule of *ejusdem generis* the quoted general language means income of the same type as those categories of income specifically mentioned, and the statute thus defines the nature or type of income taxed, regardless of the manner of payment. The House and Senate reports in connection with the original enactment of Section 211 (1), the language of which was adopted from the withholding at source provision which had been in effect as to nonresident aliens since 1917, not only so interpreted the statute but attached no significance to the words "annual or periodical" except as perhaps making it more clear that the statute did not cover gain from the sale of property, the general language of the statute quoted above being interpreted as meaning "other fixed and determinable income" and "other fixed and determinable income (not including capital gains)." It is also evident that as far back as 1917 and through all the intervening years Congress attached no importance to the words "annual or

periodical," for the information at source provision as to citizens has since 1917 covered the very same categories of income specifically mentioned in Section 214 (a) (1), with the exception of dividends added in 1936, and "other *fixed or determinable* gains, profits, and income" while at the same time, since 1917, the provision for withholding at source has covered the same specified categories of income and "other *fixed or determinable annual or periodical* gains, profits, and income." The two general phrases were used interchangeably in a legislative report in 1918 referring to the two statutes.

The court below was plainly in error in thinking that an interpretation of Section 214 (a) (1) in accordance with the legislative materials would amount to an excision of the words "annual or periodical". In adopting its own interpretation of the words "annual or periodical" as meaning "paid annually or periodically", the court below took the words "annual or periodical" from their context and failed to recognize that, since the whole phrase "fixed or determinable annual or periodical gains, profits, and income" is merely descriptive of the categories of income *specifically* listed, it is immaterial whether those categories of income are described as "fixed or determinable" income or as "fixed or determinable annual or periodical" income. It is still "other" income of the same type which is covered under the general phrase "other

fixed or determinable annual or periodical gains, profits, and income."

Section 211 (a) (1), properly construed, clearly covers lump sum royalties, including those involved in the present case. Congress plainly regarded the specified categories of income as being of the "fixed or determinable" type, exclusive of capital gains, and lump sum royalties are income of the quoted type, being wholly income when paid. Further, the legislative purpose in enacting the statute in 1936, as shown by the House and Senate reports, was, so far as pertinent here (aside from the collection of additional revenue), simply to relieve nonresident aliens not engaged in trade or business in this country of tax on capital gains which it had been found administratively impossible in most cases to collect effectually and, since Section 119 draws a distinction between "Rentals and royalties" and gain from the sale of property, Congress must have intended that nonresident aliens not engaged in trade or business in this country should remain taxable on "Rentals and royalties" as defined in Section 119 (a) (4), which includes the lump sum royalties received by taxpayer. Moreover, the reason for the exemption of tax on gain from the sale of property—the impossibility in most cases of collecting the tax effectually—is one which cannot be related to lump sum royalties for the use of a copyright, which are wholly income when paid and easily collectible.

- by withholding agents, as distinguished from the proceeds of the sale of property, where the tax is laid only on the gain, and the amount of the gain is determinable in most cases only by an ascertainment and deduction of the adjusted cost or other basis of the property.

#### ARGUMENT

**The amounts paid by publishers in 1938 and 1941 to taxpayer through his literary agent constitute taxable gross income under Section 211 (a) (1) of the Revenue Act of 1938 and of the Internal Revenue Code**

During the taxable years 1938 and 1941 taxpayer was a non-resident alien individual not engaged in trade or business and not having an office or place of business in the United States and, accordingly, was required by Section 211 (a) (1) of the Revenue Act of 1938 (Appendix, *infra*, pp. 62-63) and of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 211) to pay income tax in those years<sup>9</sup> upon amounts received from sources within the United States as—

interest \* \* \*, dividends, rents, salaries,  
wages, premiums, annuities, compensations,

<sup>9</sup> The tax was at the flat rate of 10% for 1938 and 27½% for 1941 if the aggregate gross income, as defined in Section 211 (a) (1) from sources within the United States, was less than \$21,600 for 1938 and \$23,000 for 1941. If, however, the taxable income, as defined in Section 211 (a) (1) exceeded \$21,600 for 1938 and \$23,000 for 1941, such income was subject to the normal tax and surtax applicable to individuals generally, but in no case was the tax to be less than 10% of the 1938 gross taxable income and 27½% of the 1941 gross taxable income. Section 211 (a) (2) and (c) of the Revenue Act of 1938 (Appendix, *infra*, pp. 63-64) and of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 211).



remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, \* \* \*. [Italics supplied.]

This section was originally enacted in 1936, prior to which all nonresident aliens were subject to tax on all income from sources within the United States, and covers that income of a nonresident alien which under Section 143 (b) of the Revenue Act of 1938 (Appendix, *infra*, pp. 61-62) and of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 143), as well as (with the exception of some dividends prior to 1936) under the successive revenue laws both prior to and since the enactment of Section 211 (a) (1) in 1936, has been subject to withholding of the tax at source.<sup>10</sup> In interpreting the withholding tax section of the various Revenue Acts from 1924 to 1936 and both the withholding tax section and Section 211 (a) (1) from 1936 on, the pertinent Treasury Regulations,<sup>11</sup> like Articles 143-2 and 211-7 of Treasury Regulations 101 (see

<sup>10</sup> See footnote 18, *infra*, p. 29.

<sup>11</sup> Article 362 of Treasury Regulations 65, promulgated under the Revenue Act of 1924, and of Treasury Regulations 69, promulgated under the Revenue Act of 1926; Article 762 of Treasury Regulations 74, promulgated under the Revenue Act of 1928, and of Treasury Regulations 77, promulgated under the Revenue Act of 1932; Article 143-2 of Treasury Regulations 86, promulgated under the Revenue Act of 1934; Articles 143-2 and 211-7(a) of Treasury Regulations 94, promulgated under the Revenue Act of 1936, and of Treasury Regulations 101, promulgated under the Revenue Act of 1938; Sections 19.143-2 and 19.211-7(a) of Treasury Regulations 103, promulgated under the Internal Revenue Code; Sections 29.143-2 and 29.211-7(a) of Treasury Regulations 111, promulgated under the Internal Revenue Code.

Appendix, *infra*, pp. 65, 67-69), promulgated under the Revenue Act of 1938, have provided that while the language of the statute specifically covers interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments, "other kinds of income are included; as, for instance, royalties". On the other hand, these Regulations state that—

The income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income. \* \* \*

The decision below, holding that the payments by publishers received by taxpayer in 1938 and 1941 through his literary agent are not taxable under Section 211 (a)(1), was based upon two grounds. The court first concluded that the payments by the publishers are exempt from taxation under the statute as constituting the proceeds from sales of personal property (R. 92-96) and then held, in addition, that the payments did not come within the terms of the statute because they did not answer the description of "annual or periodical" gains (R. 96-98), apparently because they were paid as single sums.

The Government's position is that the payments by the publishers constituted lump sum royalties for the purposes of the statute and that the statute, instead of covering only income which is paid annually or periodically, defines the nature

or type of income taxed, regardless of the manner of its payment, and covers lump sum royalties. This position is supported not only by *Rohmer v. Commissioner*, 153 F. 2d 61 (C.C.A. 2d), certiorari denied, 328 U. S. 862, with which the decision below is in direct conflict, but, we submit, by the full context of the statute, its legislative history, administrative practice and other prior decisions.

Indeed, until the rendition of the decision below it had appeared settled that nonresident aliens were taxable under Section 211(a)(1) on all income, regardless of its form, from transfers of less than whole interests in copyrights. Miller, *Taxation of Income from Literary Property Owned by Nonresident Aliens*, 54 Yale L. J. 879, 885 (1944-1945). Even before the decision of the Court of Appeals for the Second Circuit in *Rohmer v. Commissioner*, *supra*, which was decided in 1946 and rejected by the court below, Rohmer's literary agent had withheld the tax on the lump sum payments made in that case in 1940 for the serial rights to "The Island of Fu Manchu" and Rohmer and his wife had included the payments in their gross income. (See R. 14-15, No. 1151, October Term, 1945.) Similarly, in the present case the tax on the payments made in 1938 and 1941 by the publishers for the serial rights and in one instance for the book rights were also withheld by taxpayer's literary

agent and the payments included by taxpayer in his gross income (see Statement, *supra*, p. 5), the issue with respect to the includibility of the payments in gross income having been raised, as in the *Rohmer* case, by way of claim for refund after the Commissioner had determined deficiencies on other grounds.

*A. For the Purposes of Section 211 (a)(1), the Agreements Between the Publishers and Taxpayer's Literary Agent were Licenses for the Limited Use of Taxpayer's Writings, Not Sales of Personal Property, and the Amounts Paid Therefor Lump Sum Royalties*

The fact that the payments by publishers in 1938 and 1941 were single lump sums does not of course preclude them from being "royalties." *Rohmer v. Commissioner; supra*. A "royalty" is defined as a duty or compensation paid to the owner of a patent or a copyright for the use of it or the right to act under it, *usually* at a certain rate for each article manufactured, used, sold, or the like. 3 Bouvier's Law Dictionary (Rawle's Third Revision) 2975; Webster's International Dictionary. It is sometimes defined as a payment proportionate to the use of a patented device, *ordinarily* in specific sums paid annually or at other stated periods for the use of the device, whether it is used much or little. *Tesra Co. v. Holland Furnace Co.*, 73 F. 2d 553, 554 (C.C.A. 6th); *Western Union Tel. Co. v. American Bell*

*Tel. Co.*, 125 Fed. 342, 348-349 (C.C.A. 1st). While a royalty is usually paid at a specified rate and periodically, a lump sum payment may also be a royalty if it is paid by a licensee to a licensor for the use of an article. *Rohmer v. Commissioner*, *supra*; *Sabatini v. Commissioner*, 98 F. 2d 753 (C.C.A. 2d); *Hazeltine Corp. v. Zenith Radio Corp.*, 100 F. 2d 10, 16-17 (C.C.A. 7th); *Ehrlich v. Higgins*, 52 F. Supp. 805 (S.D. N.Y.); *Estate of Marton v. Commissioner*, 47 B.T.A. 184; cf. *Berlin v. Commissioner*, 42 B.T.A. 668; *Kaltenbach v. United States*, 66 C. Cls. 581; *Browning Co. v. Commissioner*, 6 B.T.A. 914. As the Court of Appeals for the Tenth Circuit stated in *Commissioner v. affiliated Enterprises*, 123 F. 2d 665, 668:

While payment ordinarily is at a certain rate for each article or certain per cent of the gross sale, that in itself is not determinative. *The purpose for which the payment is made and not the manner thereof is the determining factor.* [Italics supplied.]

With respect to the income of nonresident aliens, Congress has defined "Rentals and Royalties" in Section 119 (a) (4) of the Revenue Act of 1938 (Appendix, *infra*, p. 61) and of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 119), as well as in previous Revenue Acts (fn. 16, *infra*, p. 27), as—

Rentals or royalties from property located in the United States or from any interest



in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, goodwill, trademarks, trade brands, franchises, and other like property; \* \* \*

and, as will be seen later, royalties according to that definition, even though paid in lump sums, were intended by Congress to be included within the coverage of Section 211(a)(1).

It is clear, and the court below did not hold to the contrary although taxpayer may take issue on the point, that the transactions involved here were not sales of all of taxpayer's interest and title in particular writings nor of the complete copyright interest, but were, instead, but grants to publishers of only the serial rights covered by a copyright<sup>12</sup> and in one instance of the book rights, despite the fact that the payments by Curtis, which constitute the bulk of the income involved here, were in each case forwarded to taxpayer's agent with a letter (R. 66, 73, 81) stating that the check in payment was offered and accepted with the understanding that Curtis buys "all rights in and of all stories and special articles appearing in its publications." This quoted language is broad but its effect depends upon the parties' intent (*Rossiter v. Vogel*, 134 F. 2d 908 (C.C.A. 2d)), and Curtis' letters not only

<sup>12</sup> The serial rights cover magazine and newspaper publication and exclude book, dramatic and moving picture rights. *New Fiction Pub. Co. v. Star Co.*, 220 Fed. 994 (S.D. N.Y.).

stated that the check in payment was offered and accepted. (R. 66, 73, 81) —

with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.

but also referred to Curtis' "reservation of serial rights" (R. 66, 73, 81) and assumed that taxpayer had the right to sell the motion picture and dramatic rights (R. 67, 74, 82). Obviously, therefore, the agreement as to each story contemplated the obtaining of the statutory copyright thereon by magazine publication with the proper notice of copyright. Copyrighting by such a procedure is authorized by the copyright statutes (Act of March 4, 1909, c. 320, 35 Stat. 1075, Secs. 3, 9 (17 U.S.C. 1946 ed., Secs. 3, 9)) and serves as a copyright of all component parts of the publication the same as if each story had been individually copyrighted. This copyrighting was intended to give Curtis only the serial rights under the copyright to be obtained by magazine publication. The agreements with Curtis were no different, except in form, from the agreement with Hearst's, in which it was stated that Hearst's was buying "all American and Canadian serial rights" (R. 79) and the agreement

with McFadden Publications involved in the *Rohmer* case, *supra*, where payment for "The Island of Fu Manchu" was made by a check containing an endorsement that the literary agent acknowledged full payment for the manuscript "with authority to copyright" and "With 1st and 2nd American and Canadian serial rights," Rohmer retaining the book, motion picture and stage production rights (see No. 1151, October Term, 1945, R. 13). Those agreements, also contemplated copyrighting by publication and, as Paul R. Reynolds, taxpayer's literary agent, testified in connection with the copyrights to taxpayer's stories and reassignments by Curtis to taxpayer (R. 57), the assignments by Curtis to an author are in "a regular form" and "the custom in the magazine business is to universally re-assign the rights after the magazine has exercised them."<sup>13</sup> Therefore, regardless of the precise form of these various agreements, the substantive effect was a grant of only the serial rights and thus less than

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<sup>13</sup> Paul R. Reynolds, taxpayer's literary agent, testified that Curtis took out the copyrights on the three stories of taxpayer on which it received the serial rights (R. 57) and that he felt sure Curtis later assigned the copyrights to taxpayer (R. 58), but at one point he stated that after publication Curtis assigns to the author "all the rights except the rights they retain" (R. 56).

The present case also involves a grant by taxpayer of the book publishing rights to "The Cow-Creamer" to Doubleday, Doran and Company for \$5,000, but the record does not contain the language of the agreement under which payment was made therefor. "The "Cow-Creamer" was one of the stories covered by an agreement with Curtis with respect to serial rights and was copyrighted by Curtis.

the entire bundle of rights to be obtained under the contemplated copyright by magazine publication. This is true whether the publisher became the copyright "proprietor", or held legal title to the copyright in trust for the author, and the court below apparently so assumed.<sup>14</sup>

Contrary to the decision below, the grant of serial rights or other limited rights under a copy-

<sup>14</sup> The copyright statutes provide for copyrighting by the author or "proprietor" of a work. Act of March 4, 1909, *supra*, Sec. 8 (17 U.S.C. 1946 ed.; Sec. 8.) It appears that a "proprietor" is only one who is an assignee of the full copyright privilege (*Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F. 2d 306 (C.C.A. 2d), certiorari denied, 308 U.S. 597; *Egner v. E. C. Schirmer Music Co.*, 139 F. 2d 398 (C.C.A. 1st), certiorari denied, 322 U.S. 730) but, on the other hand, it has been held that a copyright may be taken out by a publisher and the legal title held in trust for the author. (*Cohan v. Richmond*, 86 F. 2d 680 (C.C.A. 2d); *Bisel v. Ladner*, 1 F. 2d 435 (C.C.A. 3d); cf. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 266 (C.C.A. 2d); *Yardley v. Houghton Mifflin Co.*, 108 F. 2d 28 (C.C.A. 2d), certiorari denied, 309 U.S. 686; cf. *Ind. Wireless Co. v. Radio Corp.*, 269 U.S. 459, 469). In *Eliot v. Gearce-Marston, Inc.*, 30 F. Supp. 301 (E.D. Pa.), which involved a grant of serial rights to the Curtis Publishing Company under an agreement evidently substantially similar in form to the agreement used by Curtis in the present case and where Curtis reassigned to the author all rights in the article except the American serial rights (but not the copyright generally), it was stated that Curtis was the copyright proprietor and that the author was the licensee of all rights except the serial rights reserved by the publisher. That statement was not necessary to decision, for both the author and publisher had joined in the suit, the damages sought were for infringement of the serial rights, and, as the court stated, the author was not entitled to recover damages for infringement of the serial rights, although the publisher was. This decision is one on which taxpayer has placed particular reliance in the present case, but in our view of the case no question is involved as to whether Curtis became and/or remained the copyright proprietor, as to the stories on which it received only the serial rights. Indeed, the court below did not hold to the contrary.

right results in a license, not a sale. A copyright in any form, statutory or common law, is a monopoly, consisting only in the power to prevent others from reproducing the copyright work (*RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86, 88 (C.C.A. 2d), certiorari denied, 311 U. S. 712), a right distinct from the literary property itself. The copyright covers the right to prevent publication and reproduction in various forms, such as by magazine and newspaper publication (called the "serial rights"), book publication, dramatic production, and movie production. When one or more of those rights is transferred, the transferee receives the right to use the copyrighted work for a limited purpose and thus receives a license. Only in a broad sense can the transferor be said to have "sold" and the transferee to have "bought" a property right, for the property right is of something less than the whole and neither the transferee's title, whether legal or equitable, nor his right to sue for infringement is severable from the full copyright. The transferee therefore does not receive the general and absolute property right essential to a sale. Cf. *Waterman v. Mackenzie*, 138 U. S. 252, 255. Thus it had been held in numerous cases that the grant of a limited right under a copyright is a license and not a sale. See *Rohmer v. Commissioner*, *supra*; *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F. 2d 306, 311 (C.C.A. 2), certiorari denied, 308 U. S. 597; *Sabatini v. Commissioner*,



98 F. 2d 753 (C.C.A. 2d); *Elglick v. Higgins*, 52 F. Supp. 805 (S.D. N.Y.); *Eliot v. Geare-Marston, Inc.*, 30 F. Supp. 301, 306 (E.D. Pa.); *M. Witmark & Sons v. Pastime Amusement Co.*, 298 Fed. 470 (E.D. S.C.), affirmed, 3 F. 2d 1020 (C.C.A. 4th); *New Fiction Pub. Co. v. Star Co.*, 220 Fed. 994 (S.D. N.Y.); *Empire City Amusement Co. v. Wilton*, 134 Fed. 132, 133 (D. Mass); *Estate of Marten v. Commissioner*, 47 B.T.A. 184; *Berlin v. Commissioner*, 42 B.T.A. 668.

This Court's decision in *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, lends support to those decisions. In that case an artist unequivocally transferred to another the right to copyright one of his paintings and the question was whether the picture was protected by the copyright which the transferee secured prior to the exhibition of the picture by the artist. Among other things, it was contended that the transferee was but a licensee of the artist and in answer to that contention this court stated (pp. 296-297):

But we think the transfer in this case accomplished what it was evidently intended to do, a *complete* transfer of the property right of copyright existing in the picture. *There is no evidence of any intention on the part of Sadler [the artist] to retain any interest in this copyright after the sale to Werckmeister [the transferee of the right to copyright]; \* \* \** [Italics supplied.]

The implication is that only a license would have resulted had the artist retained an interest in the copyright to be obtained.

The court below, in holding that a "sale" results when an author grants to a publisher the right to use his story for a limited purpose, appears to rest more on the ground that the grant of a license may properly be called a "sale" than that the grant of the right to use the story for a limited purpose is not a "license."<sup>15</sup> At one point in its opinion the court recognized that the payments by publishers in the present case were "for a right or privilege" (R. 95), and the court's conclusion that the publisher's payments were the proceeds of sales was stated to be based "on the inherent nature of the transfer" (R. 95) which in turn rested on the court's conclusion that there is nothing inherent in the nature of a copyright "which renders impossible" separate sales of the several parts which comprise the whole (R. 93). Further, the court apparently attached significance to the fact that the grant of a limited right under a copyright "is generally recognized in the commercial exploitation of

<sup>15</sup> The rejection of the decisions holding that the grant of a limited right under a copyright is a license rather than a sale was based on the court's conclusion that the decisions stemmed from the theory of indivisibility of a copyright for the purpose of infringement suits only and that "the only ground for the indivisible theory, (that is, the inability of the assignee of a part of a copyright to sue for infringement), has been swept away" by the fact that "an exclusive licensee" may now join the owner of the copyright in an infringement suit. (R. 95.)

literary works as a sale" (R. 94), though the court had itself stated in *Whitehead v. Commissioner*, 148 F. 2d 748, 720 (C.C.A. 4th) that—

Transactions, as to their nature, are judged by their legal attributes and juristic consequences, not by titles affixed thereto by individuals. \* \* \*

Concededly, the grant of a license may in a loose sense be called a "sale" but that does not mean that the grant is actually a sale nor, more importantly, that it is to be treated as such for the purposes of Section 211 (.) (1).

In resolving the question whether the grant of a right to use a copyright for a limited purpose should be deemed a license, according to its true nature, or classified as a sale for the purposes of Section 211(a) (1), effect must be given to Section 119 of the Revenue Act of 1938 (Appendix, *infra*, p. 61) and of the Internal Revenue Code (26 U.S.C. 1946 ed., Sse. 119), which the court below completely ignored. Section 119, now as prior to 1936,<sup>16</sup> when all nonresident aliens were taxable on *all* income from sources within the United States,<sup>17</sup> defines what constitutes income from sources within the United States. In that section are set forth certain categories of income such as interest,

<sup>16</sup> Section 217 of the Revenue Acts of 1921 (c. 136, 42 Stat. 227); 1924 (c. 234, 43 Stat. 253); and 1926 (c. 27, 44 Stat. 9); Section 119 of the Revenue Acts of 1928 (c. 852, 45 Stat. 791); 1934 (c. 277, 48 Stat. 680), and 1936 (c. 690, 49 Stat. 1648).

<sup>17</sup> See, e. g., Sections 119, 211-217 of the Revenue Act of 1934.

dividends (with some exceptions), compensation for personal services, gain from the sale of real property, *gain from the sale of personal property* the source of which depends to a large extent on the place of sale and in some cases can be partly from sources without and partly from sources within the United States (Sec. 119 (a)(6) and (e)), and (Sec. 119(a)(4)):

(4) RENTALS AND ROYALTIES.—Rentals or royalties from property located in the United States or from any interest in such property, *including rentals or royalties for the use of, or for the privilege of using in the United States,* patents, *copyrights*, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property; \* \* \* [Italics supplied.]

Royalties "for the use of or for the privilege of using in the United States \* \* \* copyrights" plainly include not only payments for the use of or for the privilege of using literary works already copyrighted by the author but payments made under arrangements such as those with Curtis, where the use of particular stories by taxpayer was granted for only a limited purpose covered by a copyright but was effected under an arrangement which contemplated the simultaneous termination of the common law copyright and obtaining of the statutory copyright by publication. Moreover, Section 119(a)(4) allows for no distinction in the form

in which the use of a copyright is conferred nor in the result so far as legal title to the copyright is concerned, so long as the payment is made for the use of or for the privilege of using the copyright and is thus a royalty. Since the language of the withholding section (see Sec. 143 (b), Appendix, *infra*, pp. 61-62), both before and after 1936,<sup>18</sup> and the identical language of Section 211 (a)(1) since its enactment in 1936 specifically includes "rent", and the pertinent Treasury Regulations have long provided that royalties are included under the statutory language "other fixed or determinable annual or periodical gains, profits, and income," the obvious and necessary conclusion is that "Rentals and royalties" as defined in Section 119 (a)(4) for the general purpose of classifying the income of a nonresident alien from sources within the United States must be similarly treated as rentals and royalties, not as the proceeds from the sale of personal property, for the more specific purposes of determining what income is subject to withholding as to all nonresident aliens and taxable under Section 211 (a)(1) as to nonresident aliens not engaged in trade or business in the United States. Article 211-7 (a) of Treasury Regulations

<sup>18</sup> Section 221 (a) of the Revenue Acts of 1918 (c. 18, 40 Stat. 1057), 1921, 1924, 1926; Section 144 (b) of the Revenue Act of 1928; Section 143 (b) of the Revenue Acts of 1932 (c. 209, 47 Stat. 169), 1934, 1936 and 1938; Section 143 (b) of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 143).



101 (Appendix, *infra*, pp. 68-69) so provides, in the following language:

A nonresident alien individual within class (1) referred to in the preceding paragraph is liable to the tax upon the amount received from sources within the United States, *determined under the provisions of section 119, which is fixed or determinable annual or periodical gains, profits, and income.* \* \* \* [Italics supplied.]

The language of Section 119 (a) (4) does not by its terms make any distinction as to the manner of payment for the use of or for the privilege of using a copyright and it has long been established that no such distinction is to be drawn. Thus, in interpreting the provision in 1933, the Treasury Department ruled that a lump sum payment for the first and second American and Canadian serial rights of an author's output of stories was a royalty and not a sale of property. I. T. 2735, XII-2 Cum. Bull. 131-135 (1933). Further, as the Court of Appeals for the Second Circuit stated in *Rohmer v. Commissioner*, *supra* (p. 63):

In *Sabatini v. Commissioner*, 2 Cir., 98 F. 2d 753, we held that income, consisting of a lump sum payment, under a contract made in England for the transfer by a nonresident alien of the world-wide right to produce motion pictures for a limited period, was not derived from a sale of property in England but was taxable as royalties, paid in advance, for the

use in the United States. The withholding provision was not involved. The tax on aliens at that time included a tax on the proceeds of a sale of personal property, but not if the property was produced without and sold without the United States; however, the tax, as noted above, also included a tax on "royalties for the use of ~~or~~ for the privilege of using in the United States. \* \* \* copyrights, \* \* \* and other like property." In the *Sabatini* case, we assumed that, because the contract was made in England, if the transaction was a "sale," it was not taxable; holding that it was not a sale, we held that the proceeds were taxable as royalties. \* \* \*

The decision in *Sabatini v. Commissioner, supra*, rendered in 1938, has been consistently followed in all pertinent decisions relating to the taxation of nonresident aliens, with the exception of the decision in the present case by the court below. See *Rohmer v. Commissioner, supra*; *Ehrlich v. Higgins*, 52 F. Supp. 805 (S.D. N.Y.); *Estate of Marton v. Commissioner*, 47 B.T.A. 184; *Berlin v. Commissioner*, 42 B.T.A. 668. In accord is *Molnar v. Commissioner*, decided October 16, 1945 (1945 P-H T.C. Memorandum Decisions, par. 45,317), appealed and affirmed on another point, 156 F. 2d 924 (C. C. A. 2d).

*Goldsmith v. Commissioner*, 143 F. 2d 466 (C.C.A. 2d), certiorari denied, 323 U. S. 774, which appears to be the only decision other than

the decision below unequivocally holding that a grant of limited rights under a copyright may be classified as a "sale," actually recognizes that such a grant is a "license" and is in no way inconsistent with the view that for the purposes of Section 211 (a) (1) payment therefor is to be treated as a royalty.<sup>19</sup> In the *Goldsmith* case, *supra*, the question was whether the payments received by a playwright for the assignment of the exclusive motion picture rights in a play were to be treated as ordinary income or as capital gains from the sale of capital assets within the meaning of Section 117 (a) (1) of the Revenue Act of 1938, c. 289, 52 Stat. 447, the playwright being a citizen of this country rather than a nonresident alien. Judge Chase, who wrote the main, but not the majority, opinion,

<sup>19</sup> The court below seems to have thought that *General Aniline & Film Corp. v. Commissioner*, 139 F. 2d 759 (C.C.A. 2d), and *Commissioner v. Celanese Corp.*, 140 F. 2d 339 (App. D.C.), also support the view that the grant of limited rights under a copyright may be classified as a sale (see fn. 2, R: 93-94), but those decisions are plainly distinguishable. Both cases involved an assignment of patent rights. *General Aniline & Film Corp. v. Commissioner*, *supra*, decided by the Court of Appeals for the Second Circuit, was explained and distinguished by that court in its decision in the *Rohmer* case (p. 64), the decision which is on all fours with our position here. *Commissioner v. Celanese Corp.*, *supra*, which, like *General Aniline & Film Corp. v. Commissioner*, *supra*, involved the statute providing for withholding of tax from the income of nonresident aliens, turned on a holding that there had been a sale of the entire right, title and interest of the vendor in certain patents, the conditions attached to the sale being merely conditions subsequent which might have resulted in loss of the patents by the vendee. Significantly, Judge Dobie, who sat by assignment in that case, dissented from the decision below in the instant case.

held that the payments were not capital gains under Section 117 (a) (1) because the assignee of the motion picture rights was a licensee and the payments received by the taxpayer accordingly were royalties which were taxable as ordinary income. Judge Learned Hand, writing an opinion in which Judge Swan concurred, also held the payments taxable as ordinary income, but for another reason. He stated that the taxpayer was in business as a playwright, that an *exclusive license* is for most purposes treated as "property" and that he thought it was "property" within Section 117 (a) (1) and its grant a "sale," and that the payments received therefor were ordinary income because they came within the exclusion in the definition of capital assets of "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." Judge Hand reasoned that the Congressional intent in excluding as capital transactions sales of property held primarily for sale to customers in the ordinary course of a taxpayer's business was to mass together and tax as a single source of ordinary income the proceeds of transactions which were "quite as though the taxpayer were giving his services for hire upon separate occasions" (p. 468) and thus concluded (p. 468):

This being in my judgment what the section was aiming at, I see no reason to balk at the words used. It does not *unduly* strain the

meaning of "sale" to *make it include an exclusive license*; \* \* \*. [Italics supplied.]

At another point Judge Hand referred to the grantee of the motion picture rights as a "licensee" (p. 467). The opinion therefore recognized that the grant of the motion picture rights was a license and classified it as a "sale" only for the purpose of effectuating what was deemed to be the Congressional intent as to Section 117(a)(1), a different statute from the one involved in the present case.

Here, to "strain" the meaning of "sale" to include a license would frustrate rather than effectuate the Congressional intent, as will be seen, but the court below completely ignored that fact and indeed was apparently concerned only with the abstract question whether the grant of a limited right under a copyright may *ever* be called a "sale." The court even overlooked the real basis of the majority opinion in the *Goldsmith* case and assumed (fn. 2, R. 93-94) that the opinion was inconsistent with the holding of the same court in *Rohmer v. Commissioner, supra*, that the grant of a limited right under a copyright is a license and not a sale and the payment therefor a royalty for the purposes of Section 211 (a)(1). The Court of Appeals for the Second Circuit had itself stated in its decision in the *Rohmer* case, a decision by a unanimous court including Judge Swan who was one of the majority in the *Goldsmith* case, that (p. 65):



And, because of the differing histories and purposes of Sec. 117 and Sec. 211 (a) (1) (A), respectively, we think that the views expressed by the majority in the *Goldsmith* case have no bearing here. It is well to remember that the concepts employed in construing one section of a statute are not necessarily pertinent when construing another with a distinguishable background.

Taxpayer will no doubt attempt to distinguish *Rohmer v. Commissioner, supra*, on the same theory urged below—that the decision was based on the ground that the taxpayer there retained copyright ownership whereas in the present case “title” passed. The distinction is without warrant. While the *Rohmer* decision did at one point refer to Rohmer as the copyright owner, the court was apparently using the term “copyright” in the common law sense as the author’s bundle of rights in his literary manuscript, for the transcript of record in the case, which did not include any of the evidence before the Tax Court, did not show who was the statutory copyright owner nor any facts from which a conclusion in that connection might be drawn. The findings of the Tax Court simply reflected (5 T.C. 184) that Rohmer granted to McFadden Publications the American and Canadian serial rights, together with the radio rights, to “The Island of Fu Manchu” with authority to the publisher to copyright it. The story was presumably published and thus copyrighted, but the

findings did not show that it had been. Taxpayer's assumption that "title" passed in the present case is a legal conclusion based on the fact that in *Eliot v. Geare-Marston, Inc.*, 30 F. Supp. 301 (E.D. Pa.), which involved an apparently similar agreement with Curtis, it was stated that Curtis was the copyright owner. The present record does not show whether Curtis reassigned the copyright to taxpayer or just the rights other than serial rights (see fn. 13, *supra*, p. 22) but in any event taxpayer's interest in the copyright title was such that he could compel the joinder of Curtis in a suit for infringement. The latter fact was given considerable weight by the court below (R. 95), which failed, however, to recognize that its result was to remove any doubt that the payments by Curtis were royalties "for the use of or for the privilege of using in the United States \* \* \* copyrights" within the meaning of Section 119 (a) (4) and were thus required to be treated as royalties for the purposes of Section 211 (a) (1).

B. *The Phrase "other fixed or determinable annual or periodical gains, profits, and income" Contained in Section 211 (a)(1) Defines the Nature or Type of Income Taxed and Includes Lump Sum Royalties*

The second ground for the decision below requires consideration of the proper interpretation

of Section 211 (a) (1), under which, as previously stated, taxpayer is taxable upon—

the amount received, \* \* \* from sources within the United States as interest \* \* \*, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, \* \* \*. [Italics supplied.]

The court below, while conceding that "it is reasonable to conclude that Congress intended Section 211 (a) (1) (A), as enacted in 1936, to include royalties" (R. 96), stated that the section "does not tax all payments or all royalties but only those which are 'fixed or determinable annual or periodical gains'" (R. 96) and held that the payments by publishers to taxpayer, through his United States literary agent, are not covered by the statute because the payments were made in single lump sums rather than annually or periodically (R. 95-96). The court rejected the interpretation placed on the statute by the Court of Appeals for the Second Circuit in the *Rohmer* case and stated that the language "other fixed or determinable annual or periodical gains, profits, and income" cannot be deemed "descriptive of the nature or type of income regardless of the actual manner of payment" without excising the words "annual or periodical" from the statute. (R. 96-97.) Then, after so holding, the

court stated that it did not mean that a lump sum payment is *never* subject to taxation under the statute. (See fn., R. 97.)

In holding for the purposes of this case that the statute covers only payments which are made annually or periodically and excludes lump sum payments, the court below adopted an arbitrary interpretation of the words "annual or periodical" and departed from established criteria for interpretation of statutes. As this Court stated in *Helvering v. Stockholms &c. Bank*, 293 U. S. 84, 93-94:

The intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes, and that intention is to be ascertained, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will. \* \* \*

The intention being thus disclosed, it is enough that the word or clause is reasonably susceptible of a meaning consonant therewith, whatever might be its meaning in another and different connection. We are not at liberty to reject the meaning so established and adopt another lying outside the intention of the legislature, simply because the latter would release the taxpayer or bear less

heavily against him. To do so would be not to resolve a doubt in his favor, but to say that the statute does not mean what it means.

When the language of Section 211 (a) (1) is interpreted in accordance with these criteria, the result, we submit, is a conclusion that the statute simply defines the type or nature of income taxed, irrespective of the manner of payment, and includes lump sum royalties, as the *Rohmer* decision held and as was implicit in the decisions in *Molnar v. Commissioner*, 156 F. 2d 924 (C.C.A. 2d); *Ehrlich v. Higgins*, 52 F. Supp. 805 (S.D. N.Y.); and *Estate of Marton v. Commissioner*, 47 B.T.A. 184.

The very language of Section 211(a) (1) shows that the coverage of the statute is not limited to amounts which are paid annually or periodically. The section does not state that it covers interest, dividends, rents, compensation, etc., and other fixed or determinable income "which is paid annually or periodically"; it imposes tax upon the amount received as interest, dividends, rents, compensation, etc., "or other fixed or determinable annual or periodical gains, profits, and income." The words "annual or periodical" must be considered in their context, and under the familiar rule of *eiusdem generis* the general phrase "other fixed or determinable annual or periodical gains, profits, and income" must be assimilated to the particular words "interest,



\* \* \* dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments' and restricted to income of the same type unless the legislative intent requires an even broader interpretation and the language used is susceptible of that interpretation. See *Helvering v. Stockholms &c. Bank, supra*, pp. 88-89. The categories of income which are specifically designated under the statute constitute what Congress deemed to be "fixed or determinable annual or periodical" income and the phrase "other fixed or determinable annual or periodical gains, profits, and income" (Italics supplied) means other income of like nature. Most of the categories of income specifically designated are ordinarily paid annually or periodically but all of them, with the possible exception of annuities and dividends (but cf. *De Nobili Cigar Co. v. Commissioner*, 143 F. 2d 436 (C.C.A. 2d)), are susceptible of lump sum payment. Since they are specifically made taxable, it can hardly be assumed that they are not taxable if paid in a lump sum.

Thus, in *Commissioner v. Raphaël*, 133 F. 2d 442 (C.C.A. 9th), certiorari denied, 320 U. S. 735, which involved the taxability to a nonresident alien of a lump sum of \$398,079.71 for interest included in a judgment for the fraudulent sale of land, the taxpayer's contention that the interest was not periodical income was rejected,

the court stating that the statute specifically applies to periodical gain as distinguished from periodical income and that "because the interest gain is not *payable* periodically makes it nonetheless interest income when paid" (p. 445). A similar conclusion was implicit in *De Nobili Cigar Co. v. Commissioner*, *supra*, where it was held that distributions to nonresident alien stockholders in redemption of preferred stock constituted dividends under Sections 115 (b) of the Revenue Acts of 1936 and 1938 and thus were taxable under Section 211 (a) and "subject to withholding under Section 143 (b)." .

The court below seems to have thought that the pertinent Treasury Regulations interpret Section 211 (a) (1) as covering only income which is paid annually or periodically because the Regulations state that "Only fixed or determinable annual or periodical income" is subject to withholding under Section 143 (b) and taxable under Section 211 (a) (1). (R. 96.) That quoted phrase, however, is in the language of the statute and not an interpretation of it. In so far as the Regulations reflect an interpretation of the statutory language, they are not illuminating except to the extent that they have unequivocally stated for years that the statute covers royalties and does not cover gain from the sale of real or personal property. Article 211-7(a) of Treasury Regulations 101, promulgated under the Revenue

Act of 1938 (Appendix, *infra*, pp. 68-69), like the Regulations promulgated under the 1936 Act and under the Internal Revenue Code with respect to Section 213(a)(1),<sup>20</sup> contains the following statement indicating the application of the rule of *eiusdem generis*:

*Specific items of fixed or determinable annual or periodical income are enumerated in the Act as interest \* \* \*, dividends, rents, salaries, wages, premiums, annuities, compensation, remunerations, and emoluments, but other fixed or determinable annual or periodical gains, profits, and income are also subject to the tax, as, for instance, royalties.*  
 \* \* \* [Italics supplied.]

and then refers to the Regulations promulgated with respect to Section 143(b), the withholding provision, for a determination of fixed or determinable annual or periodical income. The Regulations under the withholding provision (see, e.g., Article 143-2 of Treasury Regulations 101, Appendix, *infra*, pp. 65-66) have since 1918 provided that<sup>21</sup>—

The income need not be paid annually if it is paid periodically; that is to say, from

<sup>20</sup> Article 211-7(a) of Treasury Regulations 94; Section 19-211-7(a) of Treasury Regulations 103.

<sup>21</sup> See Article 362 of Treasury Regulations 45 and 62, promulgated under the Revenue Acts of 1918 and 1921, respectively, and provisions of Treasury Regulations cited in fn. 11, *supra*, p. 15.

time to time, whether or not at regular intervals. \* \* \*

which would indicate an interpretation of the statute as covering only income which is actually paid annually or periodically, but the same Regulations immediately follow with this statement:

That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical. \* \* \*

this reflecting that periodic payment is not in fact necessary, the length of time during which payments are to be made being reducible to one single lump sum payment. The Regulations promulgated with respect to the 1936 and 1938 Revenue Acts<sup>22</sup> further provided that—

The share of the income of an estate or trust from sources within the United States which is distributable, *whether distributed or not*, or which has been paid or credited during the taxable year to a nonresident alien beneficiary of such estate or trust constitutes fixed or determinable annual or periodical income within the meaning of section 143(b). \* \* \* [Italics supplied.]

<sup>22</sup> Article 143-2 of Treasury Regulations 94 and 101.

More pertinently, Article 143-3 of Treasury Regulations 101 & Appendix, *infra*, p. 67), which is identical to a provision contained in other Regulations promulgated since 1936,<sup>23</sup> provides that, by virtue of a tax convention with France—

*The following items of fixed or determinable annual or periodical income from sources within the United States received by a citizen of France residing in France, or a corporation organized under the laws of France, are not subject to the withholding provisions of the Revenue Act of 1938 \* \* \*:*

(1) Amounts paid as consideration for the right to use patents, secret processes and formulas, trade-marks; and other analogous rights;

(2) Income received as copyright royalties; and

[Italics supplied.]

This provision of the Regulations therefore treats such amounts as “fixed or determinable annual or periodical” income within the meaning of the withholding provision and thus of Section 211 (a) (1). The provision draws no distinction between lump sum and periodical payment and the implication is that no such distinction is to be drawn, for

<sup>23</sup> Article 143-3 of Treasury Regulations 94; Section 19.143-3 of Treasury Regulations 103; and Section 29.143-3 of Treasury Regulations 111.



amounts paid as "consideration" for "the right to use patents, \* \* \* and other analogous rights," which under Section 119(a) (4) includes copyrights, may manifestly consist of a lump sum. The Commissioner's interpretation of the Regulations is supported by all the relevant legislative materials. The Regulations should not, therefore, be construed so as to be inconsistent with the terms of the statute and with the manifest intent of Congress. To construe the Regulations as covering only payments made annually or periodically would be inconsistent with the legislative interpretation, as will be seen, and with the pertinent decisions with the exception of the decision below, as already shown, as well as with prior application of the statutory language, the Commissioner having determined a deficiency in income tax on lump sum royalties received in 1936 by a non-resident alien not engaged in trade or business in this country (see *Estate of Marton v. Commissioner, supra*) and tax on lump sum royalties paid nonresident aliens having been withheld at source by withholding agents in the present case and other cases (see *Estate of Marton v. Commissioner, supra; Ehrlich v. Higgins, supra; Rohmer v. Commissioner, supra*).

Another conceivable interpretation of the statute under the rule of *ejusdem generis*, which was not however urged in either the *Rohmer* case nor the present one but was intimated by the

court below (fn., R. 97), is that the language "fixed or determinable annual or periodical gains, profits, and income" covers gain which is periodical in relation to time, such as interest. Of the specific categories of income covered by the statute, which are the guides for determining what constitutes "fixed or determinable annual or periodical gains, profits, and income", all are of this type except compensation, remunerations and emoluments. Since these three are not, the statutory language cannot be interpreted as covering only income of that type and the legislative interpretation, as will be seen, is not so limited. It might be noted, however, that the lump sum royalties in the present case would be included under such an interpretation, for, since the renewal rights to the copyrights of taxpayer's literary works were vested by statute in taxpayer as the author (Act of March 4, 1909, *supra*, Sec. 23 (17 U.S.C. 1946 ed., Sec. 23); *Fisher Co. v. Witmark & Sons*, 318 U. S. 643) and he did not transfer the renewal right to the publishers as to any of the stories, the publishers' limited rights to use taxpayer's literary works were only for the copyright period of 28 years. The magazine publishers (but hardly the book publisher) might publish each story but once during the 28-year period, but the payment for the serial rights entitled them to publish during the entire period and if they did not do so the payment as to each story would not be unlike a lump sum paid as rent for a house which

the lessee lived in for but part of the period covered by the payment.

On the affirmative side, the relationship between Section 211 (a) (1) and Section 119 (a) (4), which is entitled "Rentals and royalties" and was discussed *supra*, pages 28-31, has long demonstrated that lump sum royalties are covered by the statutory language of Section 211(a) (1). As previously shown, Section 119 defines income from sources within the United States for the general purpose of the taxation of nonresident aliens and gives separate treatment to gain from the sale of personal property and to rentals and royalties, the latter being covered by Section 119 (a) (4) and including royalties for the use of or for the privilege of using a copyright in the United States. Section 119 (a) (4) not only makes no distinction in the manner of the payment of the royalty but was held in *Sabatini v. Commissioner, supra*, a decision rendered in 1938, and was ruled by the Treasury Department in 1933 (I. T. 2735, *supra*), to include lump sum royalties for a limited use of a copyright in the United States. Since the language of Section 211 (a) (1) and of the identical withholding section specifically covers "rent" and the pertinent Treasury Regulations have long provided that the statutory language also covers royalties, the rentals and royalties covered by Section 119 (a) (4), which include lump sum payments, are necessarily taxable under Section 211 (a) (1) as to

nonresident aliens not engaged in trade or business in this country, such as taxpayer, and subject to withholding as to all nonresident aliens. This has apparently been clear to the literary agents who are withholding agents, since, as already noted, the tax on the lump sum royalties involved in the present case, paid in 1938 and 1941, and those in the *Rohmer* case, paid in 1940, was withheld at source under the withholding section. Moreover, both Rohmer and Wodehouse included the lump sum payments in their gross income under Section 211 (a) (1) and objected to their inclusion only after the Commissioner determined deficiencies in their income tax on other grounds.

The House and Senate reports on Section 211 (a) (1) reflect a legislative purpose and interpretation of the statutory language which support the view that the statute covers lump sum royalties. The Ways and Means Committee report<sup>24</sup> stated:

In section 211, it is proposed that the tax on a nonresident alien not engaged in a trade or business in the United States and not having an office or place of business therein, shall be at the rate of 10 percent on his gross income from interest, dividends, rents, wages, and salaries and other fixed and determinable income. This tax (in the usual case) is collected at the source by withholding as provided for in section 143: *Such a nonresident will not be*

<sup>24</sup> H. Rep. No. 2475, 74th Cong., 2d Sess., pp. 9-10 (1939-1 Cum. Bull. (Part 2) 667, 673-674)

*subject to the tax on capital gains, including gains from hedging transactions, as at present, it having been found impossible to effectually collect this latter tax. It is believed that this exemption from tax will result in additional revenue from the transfer taxes and from the income tax in the case of persons carrying on the brokerage business. \* \* \**

*\* \* \* In the case of a foreign corporation not engaged in trade or business within the United States and not having an office or place of business therein, it is proposed to levy a flat rate of tax 15 percent on the gross income of such corporation from interest, dividends, rents, salaries, wages, and other fixed and determinable income (not including capital gains). \* \* \**

*It is believed that the proposed revision of our system of taxing nonresident aliens and foreign corporations will be productive of substantial amounts of additional revenue, since it replaces a theoretical system impractical of administration in a great number of cases. [Italics supplied]*

The Senate Finance Committee report <sup>25</sup> stated that the committee concurred in the main in the substantial changes made by the House bill in the present system of taxing nonresident aliens and foreign corporations and reiterated the above-quoted statements of the Ways and Means Com-

<sup>25</sup> S. Rep. No. 2156, 74th Cong., 2d Sess., pp 21, 23 (1939-1 Cum. Bull. (Part 2) 678, 691-692).



mittee. No change has been made since 1936 in the law applicable to nonresident aliens.<sup>26</sup>

It thus clearly appears that Congress interpreted the language of the withholding section as covering income of the specified categories "and other fixed and determinable income" excluding capital gains and, with that interpretation in mind, adopted in Section 211 (a)(1) the language of the withholding section simply to relieve nonresident aliens not engaged in trade or business in this country of tax on capital gains, which it had been found administratively impossible to collect effectually. It is evident that Congress interpreted the language of the withholding section, and thus of Section 211 (a)(1), as being descriptive of the nature or type of income taxed, irrespective of the manner of payment. Further, the reports affirmatively reflect the Congressional interpretation of the statutory language "other fixed or determinable annual or periodical gains, profits, and income" by interpreting the phrase as covering "other fixed and determinable income" and at one point as "other fixed and determinable income (not including capital gains)." Apparently Congress viewed the words "annual or periodical" only as making it more evident that the statute does not cover gains from the sale of property, the words "an-

<sup>26</sup> Cf. Sections 119, 143 (b), and 211 of the Revenue Act of 1936 with the same sections of the Internal Revenue Code (26 U.S.C. 1946 ed., Secs. 119, 143, 211).

nual or periodical" actually not being necessary to such an exclusion.<sup>27</sup>

The interpretation which the House and Senate reports give the statutory language was no mere oversight, for there is evidence that for years Congress has attached no importance to the words "annual or periodical" contained in the statutory language adopted from the withholding provision. Prior to 1917 there was a withholding provision applicable to citizens and non-residents alike.<sup>28</sup> Section 1211 of the Revenue Act of 1917, c. 63, 40 Stat. 300, provided for information at the source; in lieu of withholding at the source, as to citizens on—

interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or *other fixed or determinable gains, profits, and income.* [Italics supplied.]

<sup>27</sup> The pertinent Treasury Regulations have long provided (see Article 143-2 of Treasury Regulations 101, Appendix, *infra*, pp. 65-66) that—

Income is fixed when it is to be paid in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the amount to be paid may be ascertained. . . .

Hence, the phrase "fixed and determinable income" refers to amounts which are wholly income when paid, which the proceeds of a sale of property might not be.

<sup>28</sup> Section IID of the Income Tax Act of 1913, c. 16, 38 Stat. 114, and Section 8(d) of the Revenue Act of 1916, c. 463, 39 Stat. 756.

At the same time, in Section 1205 of the 1917 Act the withholding provision was retained as to nonresident aliens, and covered—

interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or *other fixed or determinable annual or periodical* gains, profits, and \* \* \*

Despite the omission of the words “annual or periodical” from the information at source provision, the House report <sup>29</sup> in connection with the Revenue Act of 1918, which also omitted the words “annual or periodical” from its information at source provision (Section 256), stated that the 1917 Act had substituted information at source for collection at source “of any *fixed or determinable annual or periodical* sum” (italics supplied) in excess of \$800. Aside from this affirmative reflection that the phrases “fixed or determinable” and “fixed or determinable annual or periodical” were used interchangeably, it is evident that the similarity of the language of the two sections was such as to have demanded an explanation if any additional significance was to be attached to the words “annual or periodical” contained in the withholding section. The 1917 provisions for information at source of the specified categories of income and “*other fixed or determinable* gains, profits, and income” (italics supplied) and for the withholding of the

<sup>29</sup> H. Rep. No. 767, 65th Cong., 2d Sess., p. 15. (1939-4 Cum. Bull. (Part 2) 86, 96).

tax at source as to nonresident aliens on the identical categories of income and "other fixed or determinable annual or periodical gains, profits, and income" have to the present day been retained in the various revenue statutes without change, except that the word "dividends" was added to the withholding provision in 1936<sup>30</sup> and in 1918 the words "compensation" and "remuneration" were changed from the singular to the plural.<sup>31</sup> Beginning in 1918, the Treasury Regulations with respect to the information at source provision<sup>32</sup> have successively stated, "Although to

<sup>30</sup> Prior to 1936 the withholding at source section excepted income received as dividends from domestic corporations subject to tax. For example, Section 143(b) of the Revenue Act of 1934, *supra*, excepted "income received as dividends of the class allowed as a credit by section 25(a)" and Section 25(a), with certain exceptions, provided for a credit against normal tax of the amount received "as dividends from a domestic corporation which is subject to taxation under this title." The exception was removed from the withholding provision in 1936 and the word "dividends" added to the specified categories of income subject to withholding. Section 211(a)(1) conformed to the change. See Sections 143(b) and 211(a) of the Revenue Act of 1936, *supra*.

<sup>31</sup> For the provisions for information at source, see Section 256 of the Revenue Acts of 1918, 1921, 1924, 1926; Section 146(a) of the Revenue Act of 1928; Section 147(a) of the Revenue Acts of 1932, 1934, 1936, 1938 and the Internal Revenue Code.

For the provisions for withholding as to nonresident aliens, see Section 221(a) of the Revenue Acts of 1918, 1921, 1924, 1926; Section 144(b) of the Revenue Act of 1928; Section 143(b) of the Revenue Acts of 1932, 1934, 1936, 1938 and of the Internal Revenue Code.

<sup>32</sup> Article 1071 of Treasury Regulations 45, 62, 65, 69; Article 811 of Treasury Regulations 74 and 77; Article 147-1 of Treasury Regulations 86, 94, and 101; Section 19.147-1 of Treasury Regulations 103; Section 29.147-1 of Treasury Regulations 111.

make necessary a return of information the income must be fixed or determinable, it need not be annual or periodical," which was followed by a reference to the Regulations under the withholding provision, but reference to the Regulations under the withholding provision, which have also remained substantially the same throughout the years, has thrown little, if any, light on what the distinction was.

The statement of the court below that it knew of no authority "for the substitution of the language of a Committee Report for that of the statute to which it relates" (R. 98) merely further demonstrates the failure of the court below to recognize the applicability of the rule of *ejusdem generis*. Under that rule the phrases "other fixed or determinable" income and "other fixed or determinable annual or periodical" income are both to be taken as meaning other income of the same type as the specified categories of interest, rent, compensation, etc. The quoted phrases mean the same thing when applied to the same categories of income and the inquiry, in interpreting the statute, is not whether the words "annual or periodical" should be deleted, as the court below assumed, but whether the income sought to be taxed is income of a type corresponding to the specified categories of income. Since the specified categories are all fixed or determinable income and dissimilar to gain from the



sale of property, there can be no objection to an interpretation of the statutory language "other fixed or determinable annual or periodical gains, profits, and income" in accord with the legislative interpretation and intent. Certainly the court below was unwarranted in holding that, despite the express language of the statute and its legislative history, the words "annual or periodical" mean "paid annually or periodically"—an interpretation which, in addition to being in conflict with the legislative intent, would enable non-resident aliens not engaged in trade or business in the United States to avoid tax and render the statute largely nugatory by arranging for the lump sum payment, instead of periodic payment, of any income from sources within the United States.

Lump sum royalties are plainly covered by Section 211 (a)(1) as interpreted according to the rule of *ejusdem generis* and the corresponding legislative intent. Lump sum royalties constitute "fixed or determinable" income and are not gain from the sale of property except possibly in a very broad sense. That they are not to be treated as gain from the sale of property for the purposes of Section 211, (a)(1) is apparent from the relationship of Section 119 and the legislative purpose in enacting Section 211 (a)(1). The distinction between gain from the sale of property and royalties for the use of or for the privilege

of using copyrights in the United States was and still is drawn in Section 119, as we previously have shown, and hence Congress, in enacting Section 211 (a) (1) to relieve nonresident aliens not engaged in business in this country of tax on the sale of property, must have intended such nonresident aliens to remain taxable on "Rentals and royalties" as defined in Section 119 (a) (4). Moreover, the Congressional purpose in excluding capital gains because they had been found administratively impossible to collect effectually makes it clear that Congress had no thought of relieving nonresident aliens of tax on lump sum royalties as distinguished from periodic royalties. The determination of the amount of capital gain from a sale of property requires the ascertainment and deduction from the sale price of the adjusted cost or other basis of the property from the sale price; hence, the administrative difficulty in most cases in collecting the tax on such gains of a nonresident alien. The purpose to avoid this difficulty shows that what Congress intended to do was simply to make nonresident aliens taxable on amounts susceptible of collection of the tax thereon by withholding at source, that is, on amounts which are wholly income when paid. Royalties, whether paid all at one time in advance or in installments, are wholly income when paid and, as the Court of Appeals for the Second Circuit stated in the *Rolamer* decision (p. 64), "it is

not at all 'impossible to effectively collect' a tax thereon.

The rejection by the court below of the legislative purpose in enacting Section 211 (a)(1) as expressed in the House and Senate reports (R. 97) was based upon an erroneous premise. The court thought that the tax on capital gains from the sale of real estate could be as easily ascertained and collected as the tax on lump sum royalties, which the court called "the gains from the sale of literary property" (R. 97), and therefore that to give effect to the legislative purpose would mean that, contrary to the pertinent Treasury Regulations, gain from the sale of real estate would also be includible under Section 211 (a)(1). It should hardly be necessary to state that as to a nonresident alien there is a vast difference between the collection of tax on lump sum royalties, which are wholly income when paid, and the collection of tax on gain from the sale of real estate, and of personal property also, where the amount of the gain must be determined by an ascertainment of the alien's adjusted cost or other basis and that basis deducted from the sale price.

The court below was also in error in stating (R. 95) that it could not suppose that Congress intended to tax the payments by publishers in the present case (which were for but a limited use of taxpayer's literary works) when a sale of taxpayer's entire right, title and interest in the manu-

scripts and copyrights to be obtained on them would not be taxable under the statute. The result as to complete sales, including the case where a nonresident alien author sells his literary work without retaining any interest in it or in the copyright to be obtained on it, is the necessary consequence of the legislative interpretation of the language of Section 211 (a) (1) and of the legislative purpose to relieve nonresident aliens of tax on capital gains. Congress could of course have continued to tax all nonresident aliens on gain from the sale of property. That it did not do so is no reason for concluding that payments for the use of or for the privilege of using a copyright in the United States are also exempt from tax, contrary to the distinction drawn in Section 119 between "Rentals and royalties" and the sale of property, for in enacting Section 211 (a) (1) Congress was motivated not by generosity but, so far as pertinent here, by the specific and limited purpose (aside from the production of additional revenue) of exempting nonresident aliens not engaged in trade or business in the United States of tax on a species of income which it had been found in most cases administratively impossible to collect. By the enactment of the statute Congress itself provided for the different treatment of gains from the sale of property and income received for the use of property, and that different treatment does not apply just to income received in connection with literary property. For example, assuming that

taxpayer owned a building in this country, the rent he received from it would be taxable under the statute, which specifically covers "rents," whereas the gain he received on a sale of the building would not be taxable.

On final analysis, the decision below is out of harmony with the language of Section 211 (a)(1); the legislative intent and purposes in enacting the statute; and the relevant decisions rendered since the enactment of the statute in 1936, which have all portended a construction of the statute, as including the payments involved in the present case.

#### CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded to that court for decision on the remaining issues in the case.

Respectfully submitted,

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NOVEMBER, 1948.



## APPENDIX

Revenue Act of 1938, c. 289, § 2 Stat. 417:

SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.

(a) *Gross Income from Sources in United States.*—The following items of gross income shall be treated as income from sources within the United States:

\* \* \* \*

(4) *Rentals and royalties.*—Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, goodwill, trade-marks, trade brands, franchises, and other like property; and

(5) *Sale of real property.*—Gains, profits, and income from the sale of real property located in the United States.

(6) *Sale of personal property.*—For gains, profits, and income from the sale of personal property, see subsection (e).

\* \* \* \*

SEC. 143. WITHHOLDING OF TAX AT SOURCE.

\* \* \* \*

(b) *Nonresident Aliens.*—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the con-

trol, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States), of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and not having any office or place of business therein and composed in whole, or in part of nonresident aliens, shall (except in the cases provided for in subsection (a) of this section and except as otherwise provided in regulations prescribed by the Commissioner under section 215) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 10 per centum thereof, except that such rate shall be reduced, in the case of a nonresident alien individual a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country:

\* \* \* \*

#### SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

(a) *No United States Business or Office.*—

(1) *General Rule.*—There shall be levied, collected, and paid for each taxable year, in

lieu of the tax imposed by sections 11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 10 per centum of such amount, except that such rate shall be reduced, in the case of a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country. For inclusion in computation of tax of amount specified in shareholder's consent, see section 28.

(2) *Aggregate more than \$21,600.*—The tax imposed by paragraph (1) shall not apply to any individual if the aggregate amount received during the taxable year from the sources therein specified is more than \$21,600.

\* \* \* \*

(c) *No United States Business or Office and Gross Income of More Than \$21,600.*—A nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein who has a gross income for any taxable year of more than \$21,600 from the sources specified in subsection (a)(1), shall be taxable with-

out regard to the provisions of subsection (a)(1), except that—

(1) The gross income shall include only income from the sources specified in subsection (a)(1);

(3) The aggregate of the normal tax and surtax under sections 11 and 12 shall, in no case, be less than 10 per centum of the gross income from the sources specified in subsection (a)(1); and

#### SEC. 212. GROSS INCOME.

(a) *General Rule.*—In the case of a non-resident alien individual gross income includes only the gross income from sources within the United States.

The corresponding sections of the Internal Revenue Code, which control the year 1941, are substantially the same, with the exceptions that the rate of withholding applicable to 1941, as specified in Section 143 (b)° of the Code, as amended by Section 5 of the Revenue Act of 1940, c. 419, 54 Stat. 516, and by Section 107 of the Revenue Act of 1941, c. 412, 55 Stat. 687, was 15% until September 29, 1941, and 27½% after that date; that the rate of tax on income of nonresident alien individuals received in 1941 specified in Section 211 (a)(1) of the Code, as amended by Section 105 of the Revenue Act of

1941, *supra*, was  $27\frac{1}{2}\%$ ; that the aggregate amount of income specified in Section 211 (a) (2) and (c) of the Code, as amended by Section 105, Revenue Act of 1941, *supra*, was \$23,000 for the year 1941; and that the percentage figure in Section 211 (c) (3) of the Code, as amended by Section 105 (c) of the Revenue Act of 1941, *supra*, applicable to 1941 was  $27\frac{1}{2}\%$ .

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

ART. 119-5. *Rentals and royalties.*—Gross income from sources within the United States includes rentals or royalties from property located within the United States or from any interest in such property, including rentals or royalties for the use of or the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other like property. The income arising from the rental of property, whether tangible or intangible, located within the United States, or from the use of property, whether tangible or intangible, within the United States, is from sources within the United States.

ART. 143-2. *Fixed or determinable annual or periodical income.*—Only fixed or determinable annual or periodical income is subject to withholding. The Act specifically includes in such income, interest, dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations and emoluments. But other



kinds of income are included, as, for instance, royalties.

Income is fixed when it is to be paid in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the amount to be paid may be ascertained. The income need not be paid annually if it is paid periodically; that is to say, from time to time, whether or not at regular intervals. That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical. A salesman working by the month for a commission on sales which is paid or credited monthly received determinable periodical income. The share of the income of an estate or trust from sources within the United States which is distributable, whether distributed or not, or which has been paid or credited during the taxable year to a nonresident alien beneficiary of such estate or trust constitutes fixed or determinable annual or periodical income within the meaning of section 143 (b). The income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income. Such items as taxes, interest on mortgages, or premiums on insurance paid to or for the account of a nonresident alien landlord by a tenant, pursuant to the terms of the lease, constitute fixed or determinable annual or periodical income.

ART. 143-3. *Exemption from withholding.*—

The following items of fixed or determinable annual or periodical income from sources within the United States received by a citizen of France residing in France, or a corporation organized under the laws of France, are not subject to the withholding provisions of the Revenue Act of 1938, since such income is exempt from Federal income tax under the provisions of the tax convention between the United States and France, signed April 27, 1932, and effective January 1, 1936 (see page 680 of the Appendix to these regulations):

(1) Amounts paid as consideration for the right to use patents, secret processes and formulas, trade-marks, and other analogous rights;

(2) Income received as copyright royalties;  
and

ART. 211-7. *Taxation of nonresident alien individuals.*—For the purposes of this article and articles 212-1, 213-1, 214-1; and 217-2, nonresident alien individuals are divided into three classes: (1) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year, and deriving in the taxable year not more than \$21,600 gross amount of

fixed or determinable annual or periodical income from sources within the United States; (2) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year and deriving in the taxable year more than \$21,600 gross amount of fixed or determinable annual or periodical income from sources within the United States; and (3) nonresident alien individuals who at any time during the taxable year are engaged in trade or business in the United States or have an office or place of business therein.

(a) *No United States business or office—General Rule.*—A nonresident alien individual within class (1) referred to in the preceding paragraph is liable to the tax upon the amount received from sources within the United States, determined under the provisions of section 119, which is fixed or determinable annual or periodical gains, profits, and income. For the purposes of section 211 (a), the term “amount received” means “gross income.” Specific items of fixed or determinable annual or periodical income are enumerated in the Act as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensation, remunerations, and emoluments, but other fixed or determinable annual or periodical gains, profits, and income are also subject to the tax, as, for instance, royalties. As to

the determination of fixed or determinable annual or periodical income, see article 143-2. The items of fixed or determinable annual or periodical income from sources within the United States received by a citizen of France residing in France which are exempt from Federal income taxation under the provisions of the tax convention between the United States and France signed April 27, 1932, and effective January 1, 1936 (see page 680 of the Appendix to these regulations), are described in article 143-3.

Sections 19.119-5, 19.143-2, 19.143-3 and 19.211-7 of Treasury Regulations 103, promulgated under the Internal Revenue Code, are substantially the same as the above. T.D. 5011, 1940-2 Cum. Bull. 18, and T.D. 5086, 1941-2 Cum. Bull. 38, conformed Regulations 103 to the provisions of the Revenue Acts of 1940 and 1941, *supra*, in respect of the withholding rates, rate of tax on gross income, and aggregate gross income, applicable to 1941.

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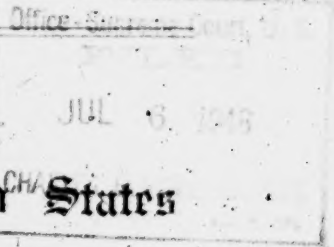
IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 856.

84



COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

v.

PELHAM G. WODEHOUSE,

*Respondent.*

BRIEF FOR THE RESPONDENT IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI.

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**BRIEF FOR THE RESPONDENT IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI.**

**Opinions Below.**

The opinions of the Tax Court and Circuit Court of Appeals are reported respectively at S. T. C. 637 and 166 F. 2d 986.

**Jurisdiction.**

The grounds on which the jurisdiction of this Court is invoked by the petitioner under Section 240(a) of the Judicial Code is an alleged conflict with the decision of the Second Circuit Court of Appeals in *Rohmer v. Commissioner*, 153 F. 2d 61, cert. denied 328 U. S. 862, and the existence of an important question which should be settled by this Court.

### •Argument.

The respondent respectfully urges that this application for a writ of certiorari be denied, for the reason that whether there is any conflict between the Second and Fourth Circuits on the question here involved cannot be known until the Second Circuit hears and decides the respondent's appeal from the same decision of the Tax Court for the year 1940, 8 T. C. 537, which for the years 1938 and 1941 was reversed in the Fourth Circuit, 166 F. 2d 986.

The taxpayer's returns for 1938 and 1941 were filed in Baltimore, for 1940 in New York. Accordingly, he filed appeals from the adverse portions of the Tax Court's decision (the main point, here in question, being the same in all three years) in the Fourth and Second Circuits, respectively. He then requested the Commissioner to stipulate that his 1940 appeal be likewise heard in the Fourth Circuit. This request was refused. The taxpayer was accordingly required to prepare substantially a duplicate record in the Second Circuit. The Commissioner twice successfully opposed the taxpayer's motion to advance the hearing of the Second Circuit appeal, which cannot now take place till the fall.

The major question here involved is not, as stated in the Commissioner's petition at page 2, the sale of serial rights for a fixed lump sum by a non-resident alien (as in *Rohmer v. Commissioner*, 153 F. 2d 61, cert. denied 328 U. S. 862), but the sale for a fixed lump sum of the whole copyright, including the serial rights, but reserving all other rights (which in this case proved to be of insubstantial value compared to the serial rights,—a fact probably important under the *Rohmer* decision), this being in no way a tax

device, but the usual form of such transactions with the Curtis Publishing Co.

The opinion of the Fourth Circuit Court of Appeals points out this distinguishing feature, before going on to express its disagreement with the general reasoning of the *Rohmer* decision. While in some respects this opinion may therefore be said to be in conflict with *Rohmer*, it is impossible to say whether the conflict is merely by way of *dicta* until the Second Circuit hands down its 1940 *Woodhouse* decision. And it is entirely impossible to say that there is any conflict between the Fourth and Second *Circuits* at this time, for the further reason that the *Rohmer* case itself was admittedly in conflict with the Second Circuit's own decision only two years before in *General Aniline & Film Corp. v. Commissioner*, 139 F. 2d 759, and also seemed to be in conflict with another of its recent decisions, — *Goldsmith v. Commissioner*, 143 F. 2d 466, cert. denied 323 U. S. 774.

It may also be noted that on another point, not involved in this application, the *Rohmer* decision "overruled *sub silentio* *Cohan v. Commissioner*, 39 Fed. (2d) 540 (C. C. A. 2), a decision which had stood for sixteen years" and "is directly contrary to *Helvering v. Taylor*, 293 U. S. 507, 513, 515", in the words of Senior Judge Learned Hand, concurring in *Molner v. Commissioner*, 156 F. 2d 924, 926.

This Court declined in the *Rohmer* case to grant certiorari, on the ground presumably that it would not settle conflicts existing only within the Second Circuit. For the same reason, we respectfully submit that certiorari should not be granted in this case, since it seems quite likely that the Second Circuit Court of

Appeals will decide its *Woodhouse* appeal in the fall in the taxpayer's favor, either distinguishing it from *Rohmer* on the facts, or overruling *Rohmer* in favor of its previous decisions in *General Aniline & Film* and *Goldsmith*.

As bearing on the likelihood of such action, and without repeating the well-reasoned arguments of the Fourth Circuit Court of Appeals herein, or analyzing in detail at this time the statutes and regulations from 1913 to date (none of which lend any support to the petitioner) we only call the attention of the Court to one point of statutory history which in itself seems to us decisive. The *Rohmer* opinion conceded (156 F. 2d 61, 64) that to tax the lump sum payment in that case required the deletion of the words "annual or periodical" from the statute, as amended in 1936, which expressly taxes only "fixed or determinable annual or periodical gains, profits and income". Now it so happens that the 1936 Revenue Act, which contained the drastic innovations in the methods of taxing non-resident aliens which have in this respect remained unchanged ever since, made two specific additions to the same sentence in the statute in which *Rohmer* makes the deletion (Sec. 143 (b) I. R. C., providing for withholding at the source, which is conceded in *Rohmer* and at page 10 of the petition herein to have the same coverage as Sec. 211 (a) (1)). The relevant parts of this sentence we quote below, indicating the two 1936 additions by supplied italics:

"All persons, \* \* \* having the control, receipt, custody disposal, or payment of interest \* \* \*, *dividends*, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical



gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States) of any non-resident alien individual, or of any partnership not engaged in trade or business within the United States \* \* \* shall deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 10 per centum thereof \* \* \*.

The addition of *dividends* to the taxable category was an important change of substance, referred to in the Committee reports; the added explanation in the parenthesis following was merely declaratory of existing law, and was not mentioned in those reports. The key words "annual or periodical" (which have appeared in the corresponding sections of every Revenue Act from 1913 to the present) appear twice in the above quoted sentence.

"Excision is a 'desperate remedy', \* \* \* only a last resort, to be availed of when all efforts to reconcile the inconsistency by construction have failed", as Judge Cardozo said in *Matter of Buchner*, 226 N. Y. 440, 443.

It seems particularly unnecessary to impute to Congress such a careless oversight as the failure to strike out the twice recurring words "annual or periodical", when not only was the very sentence in which the supposed oversight occurred, amended in that year by the express addition of *dividends* two lines above the first use of the "periodical" phrase (the only vital change from 1913 to date), but one line below Congress inserted the clarifying parenthesis of meticulous

caution quoted above. If ever the motto "*expressio unius est exclusio alterius*" were applicable, it would seem to be here, where amendatory changes were made just before and just after the phrase which *Rohmer* held Congress intended to strike out at that time.

But perhaps even more decisive of the legislative purpose is the second use of the phrase in the concluding part of the same sentence. It would be strange indeed if a phrase meant to be omitted were overlooked not once but twice. But it is much more striking that in the second instance, the words "annual or periodical", rejected in *Rohmer* as meaningless, are the only words used by Congress to describe the income covered, showing that apparently this phrase is in truth the ultimate touchstone of the whole withholding section.

For the reasons above, we believe that the decision of the Second Circuit in the companion *Wodehouse* appeal (the hearing of which before the summer recess was successfully opposed by the petitioner) will show that the alleged conflict with the Fourth Circuit does not in fact exist. The alleged confusion which the petitioner anticipates from the decision below will no doubt also be clarified by that decision.

As to the claim of the petitioner that the decision below confers an unfair advantage on foreign authors, the Court will note that *Rohmer* admits, and so does petitioner, that the outright sale of the whole copyright by a non-resident alien author is exempt from tax, as is the sale of wheat, stocks, or realty. Petitioner's theory would exempt from tax altogether a foreign author who sold his whole copyright at once, including serial, book, dramatic, and movie rights, but

tax at full surtax rates an author who sold the same rights piecemeal.

It would seem quite unfair so to discriminate among foreign authors, and equally unfair to single out foreign authors for taxation, while exempting foreign speculators in stocks, commodities and real estate. Congress has made no such invidious distinction, and it would be strange indeed if the courts should do so.

### CONCLUSION.

The decision below is correct and probably involves no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

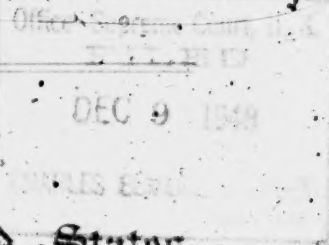
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IN THE

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OCTOBER TERM, 1948.

No. 84.

COMMISSIONER OF INTERNAL REVENUE,

*Petitioner.*

v.

PEEHAM G. WODEHOUSE,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT.

**BRIEF FOR THE RESPONDENT.**

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 84.

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COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

PELHAM G. WODEHOUSE,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT.

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**BRIEF FOR THE RESPONDENT.**

**Opinions Below.**

The opinion of the Tax Court (R. 14-28) is reported at 8 T. C. 637, and the opinion of the Court of Appeals (R. 90-98) is reported at 166 F. 2d 986.

**Jurisdiction.**

The judgment of the Court of Appeals was entered on March 16, 1948 (R. 98-99). The petition for a writ of certiorari was filed June 9, 1948, and granted October 11, 1948. The jurisdiction of this Court rests upon 28 U. S. C. Sec. 1254.



## Questions Presented.

Whether payments made by publishers in the taxable years 1938 and 1941 for the serial rights in the United States and Canada, and in one instance for the book rights, to literary works of taxpayer, a non-resident alien, constitute taxable gross income within the meaning of Section 211 (a) (1) of the Revenue Act of 1938 and of the Internal Revenue Code.

## Statutes and Regulations Involved.

The preliminary statements in petitioner's brief seem to require no comment. We add, however, the following extracts from the 1936 Senate Finance Committee Report on Section 211 (a) (1); (S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21, 23, 1939-1 C. B. (Part 2) 678, 691-693) which is substantially the same as the House Ways and Means Committee report (H. Rep. No. 2475, 74th Cong., 2d Sess., pp. 9-10; 1939-1 C. B. (Part 2) 667, 673-674), because some of the language in these reports appears to be relied upon (quite mistakenly, we submit) by the Commissioner here, as well as by the Second Circuit Court of Appeals in *Rohmer v. Commissioner*, 153 F. 2d 61, cert. denied 328 U. S. 862, as the chief basis for taxing payments of the kind here in question:

"Your committee concurs in the main in the substantial changes made by the House Bill in our present system of taxing nonresident aliens and foreign corporations. It seems obvious that a surtax on undistributed corporate profits is not well adapted to the taxation of a foreign corporation with foreign shareholders in respect of its

income from sources within the United States. In section 211 (a) it is proposed that the tax on a nonresident alien not engaged in a trade or business in the United States and not having an office or place of business thereon, shall be at the rate of 10 percent on his income from interest, dividends, rents, wages, and salaries and other fixed and determinable income, with no allowance for the deductions from gross income and credits against net income allowed to individuals subject to normal tax and surtax on net income. \* \* \*

This flat tax (in the usual case) is collected at the source by withholding as providing for in section 143. Such a nonresident alien will not be subject to the tax on capital gains, including so-called gains from hedging transactions, as at present, it having been found administratively impossible effectually to collect this latter tax. It is believe this exemption from tax will result in considerable additional revenue from the transfer taxes and from the income tax in the case of persons carrying on the brokerage business. The principal increase in revenue will result, however, from withholding tax on dividends heretofore not required.

"In the case of a nonresident alien engaged in trade or business in the United States or having an office or place of business therein, the same tax is levied upon his net income from sources within the United States as is levied upon the American citizen or resident under the House bill.

\* \* \* \*

"In the case of a foreign corporation not engaged in trade or business within the United States and not having an office or place of busi-

ness therein, the House bill would levy a flat rate of tax of 15 percent on the gross income of such corporation from interest, dividends, rents, salaries, wages, and other fixed and determinable income from sources within the United States (not including capital gains), the tax being collected in the usual case by withholding at the source, with no deductions or credits allowed. Your committee concurs in the substance of these provisions but recommends an amendment to section 231 of the House changing the rate of tax on such income. \* \* \*

\* \* \* \* \*

"Your committee believes that the proposed revision of our system of taxing nonresident aliens and foreign corporations will be productive of substantial amounts of additional revenue, since it replaces a theoretical system impractical of administration in a great number of cases."

### **Summary of Argument.**

Since 1936, taxpayers like Wodehouse, who is a non-resident alien not doing business in the United States, have been taxable only on income which prior to 1936 was subject to withholding of tax at the source (with the exception of dividends, which were expressly added to the taxable category by the 1936 Revenue Act). Only fixed or determinable annual or periodical income has ever been subject to withholding, and the proceeds of the sale of property have never been so subject.

The transfer of the copyright in Wodehouse's stories to Curtis, reserving all but the serial rights, for a fixed sum, entirely unrelated either to volume

of sales or period of time, was a sale of property within the meaning of the Revenue Acts, and hence on that ground alone not subject to tax here.

If the non-recurrent income received by the taxpayer is held to be royalty rather than purchase price, it is not fixed or determinable annual or periodical income. This seems evident from the plain language of the Revenue Acts and Treasury Regulations, and if these were in the least ambiguous, would find support in an unbroken line of legislative history and departmental interpretation from 1913 to date.

### ARGUMENT.

**The transfer of title to copyright for a single payment, neither related to any period of time nor contingent upon sales, is not "fixed or determinable annual or periodical gains, profits and income" under Sec. 211 (a) (1) (A) of the Internal Revenue Code, but is a sale of personal property and hence is not taxable to the taxpayer, a non-resident alien not engaged in business in the United States.**

The petitioner (and, in two instances, his wife) sold all Canadian and United States publication rights in a number of as yet uncopyrighted stories for fixed sums to various American magazines in 1938 and 1941. Since by far the largest amount of money was paid by the Curtis Publishing Company (hereinafter called Curtis) for three serials, we shall deal specifically only with those sales.

Curtis paid for the stories by check (after receipt of the manuscript) to the order of the Reynolds' firm in New York City, which acted as agent, petitioner and his wife being in France in 1938, and in German hands

in 1941. The stories were only subject to common law copyright when sold.

Curtis enclosed with its check a printed memorandum of the terms of sale, which included its agreement to copyright the stories which appeared in its publications, and to reassign to the author all except the serial rights.

The 1938 and 1940 Revenue Acts both provide that in the case of non-resident aliens like petitioner, only "fixed or determinable annual or periodical" income shall be taxed, and further expressly exempt from tax the proceeds of the sale of property. On both grounds, the taxpayer claims that the proceeds which he received from Curtis are not subject to tax.

The well-reasoned opinion of the Court of Appeals (R. 90-982, 166 F. 2d 986, covers the ground thoroughly, and leaves us little to do beyond attempting to analyze the Commissioner's arguments herein, the reasoning of the *Rohmer* case on which he mainly, and Judge Dobie dissenting below exclusive relied, and the real legislative history involved.

Before 1936, non-resident aliens were taxed on all income from United States sources. The 1936 Act (followed in this respect by all later Acts) limited the liability of Wodehouse's class of alien to their income *subject to withholding at the source*, and carried into the *taxing* section—I. R. C. Sec. 211(a)(1)(A)—the precise wording of the *withholding* section—Sec. 143(b). The only change made in both sections from the *withholding* section of prior Acts was the addition of *dividends* to the classifications of income now subject to tax and withholding, making both sections apply to "interest \* \* \* dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable



*annual or periodical gains, profits and income.* (Italics in quotations are ours, unless otherwise indicated.)

Ever since the above wording (except for *dividends*) was first adopted in the 1918 Act, the successive Treasury Regulations on withholding have uniformly begun, as they still do, with the words: "Only fixed or determinable annual or periodical income is subject to withholding." See for example Reg. 103 and Reg. 111, Sec. 19.143-2.

Proceeds of the *sale of property* were never subject to *withholding*, and accordingly a non-resident alien's taxable income since 1936 does not include "profits derived from the sale within the United States of personal property or real property located therein." Reg. 103, Sec. 19.215-1.

The Second Circuit Court of Appeals held on January 3, 1944 in *General Aniline & Film Corp. v. Commissioner*, 139 F. 2d 759, that down payments for patent rights, not contingent on future profits, were not taxable to this class of taxpayer, regardless whether title to the patent had passed to the assignee. The Court said:

"We incline strongly to the belief that title to the patents passed to petitioner. *Littlefield v. Perry*, 21 Wall. 205. However the passing of title does not preclude the existence of royalties. But the crucial question here is whether the royalties are income to I. G. within the meaning of this tax statute. Under one of the contracts, a lump sum payment was made for the assignment. Such a payment is clearly not covered by the statute. The same would be true as to the other four contracts if the consideration had been payable in

installments, none of which was contingent upon future profits. Under each of those four contracts a down payment was made which cannot as a matter of law be recovered by petitioner even if the profits derived by it from the patents never equal the amount of the initial payment; as those payments are not contingent upon future profits they are outside the statute. We need not now decide whether the future payments under those four contracts, which depend wholly upon future profits, must be treated otherwise." 8.

Shortly thereafter, the majority of the Second Circuit Court of Appeals in *Goldsmith v. Commissioner*, 143 F. 2d 466, cert. denied 323 U. S. 774, expressed the view that the grant of exclusive motion picture rights in a copyrighted play without limitation of time was a sale, but not of capital assets as defined in the 1938 Revenue Act, Sec. 117(a)(1). Of course, if the transfer of exclusive serial rights for a fixed sum, as here, is a sale (and it clearly is in the ordinary meaning of the word), that settles the matter, for the proceeds of sale are tax-exempt in every case—even if they are contingent on future profits. *Commissioner v. Chinese Corporation* (D. C. App.), 140 Fed. (2d) 329.

These decisions seemed to form a logical pattern of interpretation of the new method of taxing non-resident aliens inaugurated in 1936, despite some contrary decisions of the Tax Court and a New York Federal District Court to the effect that any grant of rights less than the whole copyright must generate royalties, which in turn must be taxable whether periodical or not. *Irving Berlin*, 42 B. T. A. 668;

*Estate of Manton*, 47 B. T. A. 184; *Etchick v. Higgins*, 52 Fed. Supp. 805. These lower court decisions relied on *Sabatini v. Commissioner* (C. C. A. 2d), 98 Fed. (2d) 753, which held that prior to 1936 a lump sum payment for motion picture rights under a statutory copyright for a ten-year period was a royalty, and hence taxable; withholding was not involved, and therefore the Court did not pass upon or even mention whether this "royalty" was periodical or not. On this point, *Sabatini v. Commissioner*, seemed overruled by *Goldsmith v. Commissioner*, *supra*.

The *Rohmer* decision in effect overruled *General Aniline & Film*; distinguished *Goldsmith* by giving the simple concept of "sale" an opposite meaning in two sections of the Internal Revenue Code; and set up a novel criterion of "sale" by non-resident aliens, depending not on transfer of title but on transfer of substantially all rights, what is "substantial" to be determined from case to case.

The sole ground on which the Court justified both this dual conception of a sale and its surprising about-face in holding that royalties which it conceded are not annual or periodical are still taxable, is the "legislative history" of Sec. 211(a)(1)(A), which it says "was not called to our attention before we decided the *General Aniline* case". This "legislative history", the opinion reveals, consists only of the reports of the Congressional Committees on the 1936 Act. (See the Senate Report, *supra*, which is substantially the same as the House Report.) If these reports in fact were susceptible of the Court's construction of them, it is strange that their import was overlooked in all the Treasury Regulations issued since 1936, and also in 1943 in the Government's presentation of the

*General Aniline* case, which involved a large amount of tax. The supposed "legislative history" seems to have been a ten years' after-thought of the part of the Government.

On the first point, all that can be said is that not a word anywhere in the legislative history relied on, suggests that "sale" is used in a special or esoteric sense in the case of non-resident aliens. Neither Judge Chase, who wrote the *Sabatini* opinion, and adhered to its reasoning in concurring in *Goldsmith*, nor Judge Learned Hand, in his majority *Goldsmith* opinion, intimated any reliance on any supposed different legislative history of Sections 117 and 119 I. R. C. but based their opposite conclusions on general law.

The *Rohmer* opinion explains its different interpretations of the word "sales" as to citizens and aliens, by the supposed different histories of the respective sections. However, the Court will note that the Senate Committee Report on the 1936 Act with respect to the tax on non-resident aliens on which the *Rohmer* opinion relies refers twice to "capital gains". We respectfully submit that the proper conclusion to draw from such references is that the 1936 Committees had in mind the capital gains section when they were revising the taxation of non-resident aliens. And in that event, we suggest that it was unlikely that they intended such a simple conception as the sale of property, which was fundamental to both the capital gains and non-resident alien sections, to be interpreted in contrary ways.

Moreover, the capital gains section (see 117 I. R. C.) and the section itemizing the income from United States sources taxable to non-resident aliens (which

is now sec. 119 I. R. C.) including gains from the sale of property in the United States, and rentals and royalties from such property, both appeared for the first time in the 1921 Revenue Act. The withholding section (Sec. 143(b) I. R. C.) has a much older and quite different history, and never included gains from sales. And it was the withholding section (with its legislative history) which was incorporated bodily in 1936 in what is now sec. 211(a) (1).

### Legislative History.

In the very first income tax act—that of 1913—the provisions for withholding and payment of tax at the source (which then applied to citizens and aliens alike) contained almost identically the same wording to describe the particular kinds of income subject thereto, as has been used in every Revenue Act up to the present date.

Section III of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 166, which provides for withholding, uses only the generic words "fixed or determinable annual or periodical" income (at p. 169). However, Section III of that Act (38 Stat., p. 170), which provides for payment to the Treasury Department of the amounts withheld, uses the following detailed language:

"All persons \* \* \* having the control \* \* \* or payment of interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments or other fixed or determinable annual gains, profits, and income \* \* \*

The Court will note that every item listed above has been repeated *verbatim* in every Revenue Act since



1913. And the only additions to the items have been the insertion immediately following "interest" of a parenthetical exception of certain interest on bank deposits (beginning with the 1924 Act), and the addition of "dividends", beginning with the 1936 Act, which also added the concluding blanket clarifying clause after "income": "(but only to the extent that any of the above items constitute gross income from sources within the United States)".

The longer wording of the 1913 "payment" provision above omitted the words "or periodical" immediately following "annual". If this had any significance beyond a slight lack of meticulousness in draftsmanship, it must have been that Congress was using the words "or periodical" in a sense so close to "annual" that the difference was not very significant, and was presumably limited merely to other subdivisions of the calendar, such as weekly or monthly payments.

The next Revenue Act, that of 1916, c. 463, 39 Stat. 756, Sections 8 (d) at page 762 and 9 (b) at page 763, conformed the language of the "withholding" and "payment" sections by adding the words "or periodical" to the latter.

Section 1211 of the Revenue Act of 1917 for the first time provided for information at the source in lieu of withholding at the source as to *citizens*, on the same enumerated items, but not limited to "annual or periodical" income. The deletion of the last three quoted words has made all "*fixed or determinable income*" (italics supplied) subject to information returns since then; while Section 1205 of the 1917 Act retained the *additional requirement* that the income must be "annual or periodical" to be subject to *withholding*, which was thereafter required only in the case of non-resident aliens.

This important distinction in the most vital words of the *information* and *withholding* sections of the Revenue Acts, has been continued in every Revenue Act from 1917 to date, and the Treasury regulations issued under each act during that entire period have continued to call attention thereto.

When Congress in the 1936 Act adopted for the *taxing* of this class of non-resident aliens the precise language used in the *withholding* section for nineteen years before, *ipsisssimis verbis*, with the addition of the single word "dividends", it seems too plain for argument that (with that single change) Congress intended in future to tax such persons *only* on income previously subject to *withholding*. And both Senate and House Committee Reports state that this tax "is collected at the source by withholding as provided for in section 143". [S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21, 23 (1939-1 Cum. Bull. (Part 2) 678, 691-693); H. Rep. No. 2475, 74th Cong., 2d Sess., p. 9 (1939-1 Cum. Bull. (Part 2) 657).]

The Senate Finance Committee's Report briefly describes the taxable income as "income from interest, dividends, rents, wages and salaries and other fixed and determinable income", while the full wording of the statute is:

"interest (~~except interest on deposits with persons carrying on the banking business~~), dividends, rents, salaries, wages, ~~premiums, annuities, compensations, remunerations, emoluments~~, or other fixed or determinable annual or periodical gains, profits, and income."

It is the casual compression of the statutory words "fixed or determinable annual or periodical gains,

profits and income" into "fixed and determinable income" upon which *Rohmer* seemingly relied, as does the Commissioner here, to delete from the statute the words "*annual or periodical*", which had been the heart of the withholding section for nineteen years, *and still are*.

It would seem no more absurd for a taxpayer to claim that "premiums, annuities, compensations, remunerations, emoluments," [words used in the statute—Secs. 143(b) and 211 (a) (1) (A)] were no longer intended to be taxed, because omitted in the Committee's cursory summary, than for the Government to contend that the Committee meant thus casually to cut out the core of the section—the *annual or periodical nature* of all the different types of income specified.

To interpret the words "*fixed and determinable*" as having some independent meaning except as a mere abbreviation of the full statutory language reduces them to a tautology of little meaning. Every kind of taxable income which is "fixed" is already "determined".

The words "other fixed or determinable gains, profits and income" have been used in the "information at source" section of the Revenue Acts (now I. R. C., Sec. 147) since 1918. Their difference in meaning from the more restricted coverage of the withholding section (143) has been well recognized ever since. Treasury Regulations 103 (1940 Act), Sec. 19.147-1, says:

"Although to make necessary a return of information the income *must be fixed or determinable, it need not be annual or periodical.*"

The Regulations from 1918 to date contain identical language.

But even if the House and Senate Committees had used the words "fixed or determinable income", we do not believe anyone would have thought (prior to the *Rohmer* case) that they thereby effected the substitution of the "information at source" provisions with their entirely separate elaborate machinery for the "withholding at source" ones, while at the same time incorporating the latter and not the former in the Revenue Act itself! And since 1917, both before and after the 1936 Act was passed, countless thousands of information and withholding returns have been filed on the two different sets of printed forms furnished by the Treasury Department in accordance with the different requirements of the two sections.

The Senate Finance Committee's Report does not pretend or need to have statutory precision. Its use of the phrase "*fixed and determinable*", which is a tautology *per se*, is understandable as a short-cut reference to the well known language of the withholding provisions; it would seem unthinkable as evidencing an intention to modify in any respect, much less to change the whole letter and spirit of the withholding provisions, *then already of 18 years standing*.

What the Senate Committee's Report shows beyond peradventure is the intent of Congress to eliminate all tax liability of this class of aliens except income *subject to the existing withholding provisions*. This was because "*in many cases*" (not in all cases) the tax was hard to collect otherwise. Congress did not attempt further to redefine or reclassify any type of income on account of relative difficulty of collection;

obviously the tax on profits on *land* sold in the United States, for example, could readily be collected, but Congress preferred to overlook such refinements, and proceeded on the theory that no attempt would be made in future to collect any tax from such aliens *directly*, but only *through withholding agents*, in accordance with existing law.

One *specific* change of substance was made in 1936 in the previous withholding provisions, and duly noted in the Senate Finance Committee's Report. This was the addition of *dividends* to the taxable category.

The specific inclusion naturally negatives any *implied* additional inclusion of non-periodic royalties.

The *Rohmer* opinion quotes the Committees' statement of their belief that the revision "will be productive of substantial amounts of additional revenue". This is fully explained, we respectfully submit, by the further explanatory statement in the Senate Report that larger stock transactions would produce more taxes, and that "*the principal increase in revenue will result, however, from withholding tax on dividends heretofore not required*". Further, it was self-evident that the increase in the flat rate of tax on both individuals and corporations of this class, the disallowance of all deductions, and the total abolition of the personal exemption theretofore enjoyed by all such individuals, would add substantially to the revenue. There is not a word anywhere in the Reports, or in any other legislative record so far as we have found, to suggest that the Committees or Congress expected to get more revenues by subjecting to withholding forms of income not theretofore so subject, *with the single and express exception of dividends*.

Further proof that the Congressional Committees had no intention of singling out non-periodic payments



to authors for special taxation may be found in the status of the *Sabatini* case in 1936. In December, 1933, L. T. 2735, C. B. XII-2, 431, had held that "sales" of U. S. serial and motion picture rights were really "licenses", and hence that payments therefor were taxable as royalties. This ruling dealt solely with *Sec. 119* of the Revenue Act—*Income from Sources within the United States*—and never even mentioned periodicity or "withholding", nor did its reasoning touch upon either in any way. But this ruling was disapproved in *Sabatini*, 32 B. T. A. 705, in 1935, which was not reversed on this point in *Sabatini v. Commissioner, supra*, until 1938. If Congress or its Committees gave the question any consideration in 1936, they would have found that under the decision of the highest authority connected with the Treasury Department such transactions were *sales*, and hence that their proceeds would apparently be tax free under the 1936 Act on any theory.

Incidentally, if despite *Goldsmith v. Commissioner, supra*, the highly technical reasoning of *Sabatini v. Commissioner, supra*, is followed to its logical conclusion, it seems clear that in this case, Curtis irrevocably acquired the *statutory copyright* in the stories and agreed only to *license* their later use. This is precisely the reverse of the *Sabatini* situation, where the taxpayer retained the ownership of the copyright, and merely sold a license. If there were any ambiguity in the Curtis contracts, it would seem to be resolved in the sense indicated by the decision interpreting an identical Curtis contract in *Eliot v. Geare-Marston, Inc.*, 30 Fed. Supp. 301, where the Court said (p. 306):

"The point that must be kept in mind is that

Mrs. Eliot is not and never was the copyright proprietor of the literary production involved herein. By virtue of the assignment to her by The Curtis Publishing Company of all rights except the American serial rights, she became a licensee of all rights except those reserved."

If petitioner and his wife sold the copyright to Curtis (which required an irrevocable title thereto) and thereafter were mere licensees as to the rights reserved, it seems clear that under the *Sabatini* reasoning the sum received for the assignment of the copyright would be considered the *sales price*, while any amounts realized from the subsequent disposition of the reserved *licenses* would be *royalties*. Furthermore, since the *Sabatini* opinion was influenced by the assumed indivisible nature of United States statutory copyright, it may be doubted whether its reasoning could in any case be applied to Mr. and Mrs. Wodehouse, who had only common law rights when they contracted with Curtis, and at no time, so far as appears, owned the statutory copyright.

The Second Circuit cases attach paramount importance to *copyright ownership*.

The *Sabatini* opinion says "*there was no transfer of title*". Judge Chase in his *Goldsmith* opinion cites only cases involving the sole right of the *copyright holder* to sue, and says: "Unless the assignment conveys to the assignee the title to the copyright, no sale of property is made. In this instance there was no sale of the copyright since title remained in the assignor and therefore no asset, capital or otherwise, was sold."

In *General Aniline*, the opinion shows that besides having granted licenses to others, the patent owner

reserved for itself certain rights (apparently, "substantial") to import the patent articles into the United States. In a footnote, the Court says that it regards as of no significance, as to the transfer of title, whether the assignor reserves a license, or the assignee grants one back to him; and evidently this means that in either case, *copyright title passes*. In commenting on this opinion in the *Rohmer* case, Judge Frank explains away only the rights previously assigned to others, and not those reserved to the patentee, so that the Court was evidently satisfied with that part of the *General Aniline* footnote which refers to licenses retained by the assignor, regardless of the supposed "legislative history". This seems the only explanation of his statement that if the taxpayer in *General Aniline* had previously granted away substantial rights, he could not thereafter, if an alien, make a sale of rights to any one, though he might under *Goldsmith*, if a citizen. Judge Frank could not have meant that an alien taxpayer, no matter how many rights he had granted, could not finally *sell his copyright*. But under the peculiar *Rohmer* doctrine that short of a transfer of *copyright*, an *alien* can only effect a sale if he grants simultaneously substantially all his rights, it would be logical that if he has previously *granted* a substantial part, he can no longer make a *sale* without transferring the indivisible copyright itself.

This is in accord with *Wilwer v. Harold Lloyd Corp.* 46 Fed. 2d 792, 795 (reversed on other grounds (C. C. A. 9) 65 Fed. 2d 1) where the Court held that the doctrine of indivisibility "does not prevent assignment with a reservation of particular rights;" and with *Eliot v. Geare-Marston, Inc.*, *supra*.

When we note that here Curtis acquired not only the copyright, but also rights apparently worth eight times as much in money as what Woodhouse reserved, it would seem as a practical matter rather like the tail wagging the dog to treat Curtis as a mere licensee.

The emphasis on mere *title* (or lack of it) by the Second Circuit seems overtechnical in the practical interpretation of the tax law; "the entire theory that copyright is indivisible and does not admit of partial assignment is fictitious \* \* \*." Shafter, *Musical Copyright* (2d Ed.) P. 139.

If in principle there should be no practical distinction for tax purposes between the sale of a copyright (reserving certain license rights) and the sale of certain license rights (reserving the copyright), we submit that in both cases unconditional lump-sum payments not having any determinable relation to any subsequent payments are free of tax, under the express language of the statute.

### **Departmental Practice.**

Departmental practice was, if possible, even more emphatic than the Revenue Acts in upholding the requirement of recurrence.

The *Rohmer* opinion noted, as does the Commissioner's brief at p. 16 that "the Treasury Regulations, under the successive Acts from 1918 to 1934 inclusive, provided that the withholding provisions excluded income derived from the sale of property but included 'royalties'." But there is no intimation in any of these Treasury Regulations that *all* royalties are subject to withholding, unless "royalty" is restricted to the usual acceptance of the word. The

language of Reg. 86 (1934 Act), Reg. 94 (1936 Act), Reg. 101 (1938 Act), and Reg. 103 (1940 Act) as to withholding are exactly alike as to *royalties*. Art. 143-2 in each begins with the axiom: "*Only fixed determinable annual or periodical income is subject to withholding.*" Then, after listing the statutory provisions, it concludes: "But other types of income are included, as, for instance, royalties." Art. 211-7(a) of Regs. 94, 101 and 103 paraphrases the same thought as follows: " \* \* \* *but other fixed or determinable annual or periodical gains, profits and income are also subject to the tax, as, for instance, royalties.*"

As the Tax Court recently pointed out in *Wolfe*, 8 T. C. 689, 696:

"Nor does the fact that Regulations 11, sec. 29.22 (b)(2)-2, states that amounts received as an annuity, include amounts received in periodic installments, demonstrate that we have an annuity here. The Regulation does not say that every periodic payment is annuity."

That Treasury Regulations 94, 101 and 103 use the same wording in describing the taxable income of non-resident aliens as they and previous Regulations had used for nearly twenty years as to withholding, seems another conclusive proof that no change was contemplated by Congress in 1936 in the requirement that only periodical income was subject to withholding.

Further proof that not all royalties were subject to withholding is found in the amendment to Reg. 86, Art. 143-2, made March 16, 1935 by Treasury Decision 4535. This added "dividends" to the concluding sentence quoted above, making it read: "But other



types of income are included, as, for instance, royalties and dividends." The significance of this is that prior to the 1936 Act the majority of dividends were not subject to withholding, but some were, and accordingly the Treasury Regulations grouped them in the same category with royalties. It would seem that royalties based on percentages of sales are as obvious an example of periodical income as a once-for-all-time payment for a perpetual license is of non-periodical income. The *Rohmer* opinion relies on the analogy of "interest paid for several years in one sum or rent paid in advance for the use of a building for a period of years." But is not the analogy here rather to the payment of a fixed sum for a perpetual easement? Such a transaction was held to be in effect a purchase in *Inaja Land Co.*, 9 T. C. 727.

The Treasury rulings of lesser authority than the Regulations tell the same confirmatory story of the primary importance of periodicity, only in more detail:

Bulletin "B" on "Withholding" (60 pages long), first published by the Internal Revenue Bureau in 1920, under the 1918 Act, revised July 1, 1927, under the 1926 Act (stressing payments "from time to time"; e. g., at p. 11: "earnings of lawyers and doctors are not usually within the purview of this provision of the law (unless paid as a regular retainer.)");

S. M. 975 (1919) C. B. 1, p. 121 (winnings on races not subject to withholding);

L. O. 1024 (1920) C. B. 2, p. 189 (discount, though much like interest, is not subject to withholding);

- O. D. 907 (1921) C. B., p. 232 (commission on single transaction not "fixed or determinable annual or periodical income");
- Internal Revenue News, May, 1931 (p. 3) (periodical royalties subject to withholding; not so sale for a lump sum);
- I. T. 2624, XI-1; C. B. 122 (1932) (book royalties subject to withholding);
- G. C. M. 21,575, C. B. 1939-2, p. 172 (art prizes not "fixed or determinable annual or periodical income"; citing S. M. 985 and O. D. 908, *supra*);
- I. T. 3781, Bull. Ref. 1946-3, 12,228 (p. 14) re-organization distributions taxable as dividends under Sec. 112 (e) (2), I. R. C., are not periodical income subject to withholding).

We have tried to show that there is no foundation for the claim of *Rohmer* that there was any different legislative history of secs. 117 and 119 (a) (4) I. R. C. to justify treating the same transaction as a sale of property under sec. 117, and a "royalty" under I. R. C. Sec. 119 (a) (4). In reality, the Congressional Committees had both these sections in mind in their consideration of the 1936 changes in the system of taxing non-resident aliens, as well as the withholding section (now 143 (b)).

And the Senate Committee fully realized the well-established differences between the limited coverage of the withholding provisions of Section 143 (b) (to which was confined the liability of this taxpayer's class of aliens) and the broader range of Section 119, that Section being entitled "Income from sources within the United States." For immediately

following the description of the kinds of income taxable to our class of alien, the Committee said:

"In the case of a non-resident alien engaged in trade or business in the United States or having an office or place of business therein, the same tax is levied upon his net income from sources within the United States as is levied upon the American citizen or resident under the House bill."

The Committee thus clearly distinguished between Section 143 (b) income, taxable under 211 (a) (1), and Section 119 income taxable under Section 211 (b). And the entirely separate legislative histories of Section 143 (b) and Section 119 thus continued along separate paths. Of course, Section 119 has always had this connection with Section 143 (b), that only fixed or determinable annual or periodical income from sources within the United States was ever subject to withholding. But it was not until 1936 that this limitation was explicitly stated in the withholding section.

The holding of *Rehmer* on the "sale" point, insubstantial as it seems in applying a most technical and unusual meaning to this word in one section, while apparently satisfied with the ordinary meaning in another, at least does not require the erasure of any words from the statute, as is further necessary to tax these non-periodic payments. "Excision is a desperate remedy," \* \* \* only a last resort, to be availed of when all efforts to reconcile the inconsistency by construction have failed," as Judge Cardozo said in *Matter of Bueckner*, 226 N. Y. 440, 443, in interpreting a will. "It is one of the accepted canons of construction that statutes must be read so that each word will

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have a meaning, and not so read that one word will cancel out and render meaningless another; that each word used in an enumeration in a statute of several classes or things must be presumed to have been used to express a distinct and different idea; that every provision of a statute was intended to serve some useful purpose." *Matter of Tonis v. Board of Regents*, 295 N. Y. 286, 293.

It seems particularly unnecessary to impute to Congress such a gross oversight in this case, as *Rohmer* seems to do, when not only was the very sentence (Section 1943(b)) of the withholding section of the 1936 Act (identical in this respect with the Internal Revenue Code section quoted hereinabove) in which the supposed oversight occurred, amended in that year by the express addition of *dividends* two lines above the first use of the "periodical" phrase (the only vital change from 1913 to date), but the very same sentence was further amended in a clarifying parenthesis of meticulous caution following the words "periodical gains, profits and income," by adding: ("but only to the extent that any of the above items constitutes gross income from sources within the United States") (italics supplied)." But perhaps even more decisive of the legislative purpose is the second use of the phrase in the concluding part of the same sentence. It would be strange indeed if a phrase meant to be omitted were overlooked not once but twice. But it is much more striking that in the second instance, the words "annual or periodical", rejected in *Rohmer* as meaningless, are the only words used by Congress to describe the income covered, showing that apparently this phrase is in truth the ultimate touchstone of the whole withholding section.

The implications of the *Rohmer* decision are not



limited to "royalties," but extend to all "fixed or determinable income" (except "capital gains"), which apparently will be held subject to withholding since 1936, whether periodical or not. And we gather from the Commissioner's brief at p. 40 that he considers all such payments taxable.

If in fact Congress and its Committees had by oversight allowed such an obvious error to slip by as the failure to strike out the offending "periodical" phrase, one might suppose that the Treasury Department would at once have taken steps to correct the mistake, so far as it could be regulation, or at least to warn the public, and that Congress would have corrected the error at its next session. On the contrary, both Congress and the Treasury have in repeated subsequent statutes and regulations continued to give the same prominence to that phrase.

Even as late as the argument in *General Aniline* in 1944—a case which involved over \$100,000 in tax—the Commissioner was it seems unaware of the legislative history created in 1936. It was only in presenting the *Rohmer* case in 1945 that he made known his discovery.

### **The Statutory Meaning of "Royalties"**

The Commissioner's brief (pp. 18-20) in its citation on the definition and nature of royalties requires several corrections.

The statement (p. 19) that "Congress has defined 'Rentals and Royalties' in Section 119 (a) (4) of the Revenue Act of 1938" is entirely erroneous. Not only this subsection, but all the Revenue Acts since 1913, will be searched in vain for any definition of "royalties." However, since 1918, there has been a defini-



tion of the term in Treasury Regulations, which after repeated re-enactments for thirty years must by now have the force of law. This definition is found in Art. 143-2 of Reg. 191, quoted at pp. 65-66 of the Commissioner's brief, and (with insignificant changes) in corresponding sections of all the Regulations since 1918. In effect, they are defined as "fixed or determinable annual or periodical income," for purposes of the withholding section, which has since 1936 been adopted as the full measure of taxability under Section 211(a)(1). And they have been similarly defined in Art. 211-7(a) of Reg. 94 and subsequent Regulations. This is the only definition which seems to affect the present case, which arises under that Section and not under Section 119. And for our purposes, it seems unnecessary to determine whether this definition includes all, or only some royalties, since in either case the non-periodical payments in this case are non-taxable. The only difference would arise in the case of taxpayers subject to Section 119 (a) (4), who might be taxable if the above official definition of the Regulations is only a partial one.

At any rate, the definition in the Treasury Regulations would seem to fit very well the common meaning of the word, as treated in the Commissioner's citations at pp. 18-19:

*Commissioner v. Affiliated Industries* (C. C. A. 10) 123 Fed. (2d) 665, cert. denied 315 U. S. 812, where the only dispute between the majority and dissenting judge was whether certain determinable periodical payments were rents or royalties.

*Hazeltine Corp. v. Zenith Radio Corp.* (C. C. A. 7) 100 Fed. (2d) 10, 617, where under the

contract there involved, a yearly payment for the use of patents was held to be "a period rate of royalty as distinguished from the percentage of selling price rate of royalty." This case, curiously enough, was referred to in foot-note 7 of *Rehmer* in support of the statement that a payment was no less a royalty when made in a single amount.

*Kallenbach v. U. S.*, 66 Ct. Claims, 570 (the reference to p. 581 in respondent's brief is to another case between the same parties), where the payments were for a combination of personal services and the use of a secret process at an agreed annual compensation for three years, and hence were taxed as ordinary income rather than capital gain.

*Tesra Co. v. Holland Furnace Co.* (C. C. A. 6) 73 Fed. (2d) 553-554, where the Court defined a royalty as "a payment proportionate to the use of a patented device."

In *Western Union Tel. Co. v. American Bell Tel. Co.* (C. C. A. 1), 125 Fed. 342, defendant-respondent, after contracting to pay to the plaintiff one-fifth of all "rentals of royalties" which it received, proceeded to sell perpetual licenses to all the patents covered by the contract for a block of stock, and declined to pay over the agreed one-fifth of the stock to the plaintiff. On considering all the facts, the Court construed this as a breach of faith, and reversed the lower court's decision for the defendant. It discussed the general meaning of the terms as follows at pages 348, 349:

"Royalties are commonly understood as meaning something proportionate to the use of a pat-

ented device; in other words, a kind of excise. Bouvier's Law Dictionary, "Royalty." In its more ordinary meaning, it would not literally include the shares of stock for which an accounting is demanded. In some of its uses it is a broader word than "rentals" and yet in other aspects is a broader word than "royalties." Rentals in their ordinary signification are not limited as royalties in their ordinary signification; that is, to something proportionate to the use of the patented device. The word "ordinarily" means specific sums paid annually, or at other stated periods, for the right to use a patented device, whether it is used much or little or not at all."

The last sentence refers not to royalties, as stated at page 18 of the Commissioner's brief, but to rentals.

The dictionary definitions at page 18 also seem singularly unhelpful to his contention. 3 Bouvier's Law Dictionary (Rawles 3rd Revision) 2975 gives as the sole definition:

"*Royalty*: A payment reserved by the Grantor of a patent, mining lease, etc., and payable proportionately to the use made of such right. 1 Ex. Div. 310. See Patent."

The pertinent part of the definition of "royalty" in Webster's New International Dictionary is

"a. A share of the product \* \* \* reserved by the owner for permitting another to use the property.

b. A duty or compensation paid to the owner of a patent or a copyright for the use of it or the

right to act under it, usually at a certain rate for each article manufactured, used, sold or the like." \* \* \*

The *Sabatini* opinion itself recognizes that its definition of the single payment made in that case was without precedent. Since this decision was not handed down until 1938, it seems likely that when Congress passed the 1936 Act, it had in mind the usual ordinary meaning of the term.

This Court in *Crane v. Commissioner*, 331 U. S. 1, 6, recently held that the word "property", where not specially defined in the taxing statute, must be interpreted according to its ordinary legal acceptance. Even more recently, *Jones v. Liberty Glass Co.*, 332 U. S. 524, held that the term "overpayment" must likewise be interpreted in its usual sense, and could not at this late date be made over into a "word of art." The Court relied on "the sense in which the word was first used in this context," and on the fact that "the generic character of the word was emphasized from the start." The words "sale", "royalties", and "fixed or determinable annual or periodical" (income) seem to fall within the scope of these decisions.

### **The Petitioner's Brief.**

The Commissioner's statement at page 17 that "until the rendition of the decision below it had appeared settled that nonresident aliens were taxable" on non-periodical payments must be challenged as to accuracy. The only authority cited for this statement is the note of Mr. Miller, then a third-year student at the Yale Law School, 54 Yale L. J. 879, a careful

reading of which hardly sustains the Commissioner's conclusion (the decision below received favorable comment in 48 Columbia Law Rev. 967 and 34 Virginia Law (Rev. 617). On the contrary, after the *Goldsmith* and *General Aniline & Film Corp.* decisions of the Second Circuit, the law seemed well settled in accordance with the plain meaning of the statutes and regulations; that only income previously subject to withholding was taxable to aliens like Wodehouse and that this could not include a non-periodical "royalty," even if such a thing existed for any tax purpose. And while the footnote on page 32 states that *General Aniline* "was explained and distinguished" in *Rohmer*, the former case was in fact substantially overruled on the basis of newly-discovered evidence of legislative history, which we respectfully submit was wholly illusory. The *Rohmer* opinion conceded that the Congressional purpose is not crystal clear, and that the legislative history does not put beyond all conceivable doubt the purpose to impose a tax on such transactions as that before us here.

The Commissioner here for the first time raises the issue of tax payments by Wodehouse and his agents and one or two other cautious taxpayers as if to estop them by a new principle of taxpayers' practical interpretation of the statute, but he cites no authority for this, and it would seem a dangerous principle for the Treasury in the long run. That many foreign authors found themselves unexpectedly delinquent seems clear from the Tax Treaty between the United States of America and the United Kingdom, signed on April 16, 1945 and finally effective on July 25, 1946, which in Article XVII (1) contains the extraordinary provisions that the United States



income tax liability for any taxable year beginning prior to 1936, and still unpaid, might be adjusted with the Commissioner, on a basis not less favorable than if the United States Revenue Act of 1936 had been effective for such prior years; and that if the taxpayer was not engaged in business in the United States the total interest and penalties imposed should not exceed 50% of the total tax. It is of interest to note that the Senate Committee report on this treaty (Executive Report No. 4, 79th Cong. 2nd Sess. May 10, 1946) has attached thereto a report of the Bureau of Internal Revenue on alien taxation, which states:

"The nonresident alien not engaged in trade or business in the United States is taxed on all his *fixed or determinable annual or periodical income* from sources within the United States, such as dividends, interest, rents, and royalties, but is exempt from tax on any gains from his transactions in stocks, securities, or commodities through a United States resident broker, commission agent, or custodian. The exemption thus granted to aliens in this category and on this class of transactions takes account, *inter alia*, of the rate of tax (imposed on a gross basis) on such *periodical items of income* and such administrative questions as the impracticability of determining and enforcing a tax against such aliens incident to their transactions clearing through our domestic exchanges."

The Commissioner admits at page 24 that "in a broad sense" or (at p. 27) "in a loose sense," Wodehouse might be said to have sold his stories to Curtis. We presume the Court may not only take judicial

notice that such would be the ordinary conception of the transaction, but also that any one in the literary or commercial world or in every-day life who described these sales as on a royalty basis would be thought guilty of a serious misuse of language.

The technicalities of copyright law, discussed at pages 21-27, seem adequately covered in the opinion below, which describes their amelioration since this Court's decision in *Independent Wireless Co. v. Radio Corp. of America*, 269 U. S. 459.

At pages 29-36, the Commissioner's argument seems to be that because Section 119 differentiates to some extent between royalties and sales, there must be also different treatment of them under Sections 143(b) and 211(a)(1), and because all sales are exempt under the latter Sections (only part being exempt under Section 119), all royalties must be taxed under Sections 143(b) and 211(a)(1), as they are under Section 119.

The first answer to this argument might be that if the established definition of royalties by the Treasury Department as fixed or determinable annual or periodical income is all-inclusive, then (in accord with *Goldsmith* and *contra* to *Sabatini*) the Curtis payments here would be treated under all Sections as sales and not royalties.

On the other hand, if the Treasury definition of royalties is only partial and recognizes the existence of non-periodic royalties as well, then the Curtis payments might be taxable under Section 119, but not under Sections 143(b) and 211(a)(1). There is nothing in the least unusual in the last situation, for it has been well understood for thirty years that many payments (besides sales) which are taxable under Section 119 are not subject to withholding taxes.

Beginning with page 36, the Commissioner tries to show that the payments here in question are "fixed or determinable annual or periodical income", or rather he argues that while they evidently cannot be included within that definition, they should be taxed anyway, under the doctrine of *ejusdem generis*, because they are of the general type of the categories of income specifically listed.

This seems an unusual inversion of *ejusdem generis*, which is a rule of construction usually employed to limit the scope of general words found at the end of a list of particulars, while here the Commissioner seems to advocate just the reverse,—that is, to extend (or distort) the meaning of particular words found at the end of the statutory categories on account of three general words found in the preceding list,—“compensation, remunerations and emoluments.”

On the contrary, it seems that these general terms must be understood to be limited both by the obviously “fixed or determinable annual or periodical” character of the other types of income with which they are associated (all of which, as the Commissioner admits at page 46, are “periodical in relation to time”), as well as by the use of this limiting phrase at the end of the list, whose importance has likewise been emphasized for the last thirty years by the applicable Treasury Regulations, which begin with the uncompromising statement that “Only fixed or determinable annual or periodical income is subject to withholding.” In stating at page 41 that “That quoted phrase is in the language of the statute and not an interpretation of it”, the Commissioner ignores the initial word “Only”, which seems in itself to negative his peculiar application of *ejusdem generis* to this case.

If contrary to the statutory history from 1913 to date, and the Treasury Regulations from 1918 to date, as well as the clear intent of the language of the withholding section, the purpose of Congress as authoritatively interpreted by the Treasury Department was to tax "compensation, remuneration, and emoluments", regardless of fixed periodicity, it is impossible to understand why the Treasury Department wasted so much time and effort through the years in explaining just what kinds of remunerations were subject to withholding and what were not. See Bulletin B on Withholding, and the other citations at pages 22-23, *supra*.

Apart from the clarity of its opening sentence, the following extracts from Art. 143-2, of Reg. 401, which has appeared without change from 1918 to date, seem utterly inconsistent with the Commissioner's theory:

"Income is *fixed* when it is to be paid in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the *amount to be paid* may be ascertained. The income need not be paid annually if it is paid periodically; that is to say, from time to time, whether or not at regular intervals."

This emphasis on *periodical payment* seems not to sustain the more metaphysical conception of the characteristics of income and its susceptibility to lump-sum payment. The Commissioner recognizes (p. 43) that these definitions are against his theory. But he tries to extract support from the immediately following sentence:

"That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with



the happening of an event does not make the payments any the less determinable or periodical."

Whatever else this somewhat Delphic sentence may mean, it surely does not apply to a simultaneous final exchange of rights for a lump-sum payment as here; it must refer to a case where some option or condition subsequent may operate to diminish the period of time fixed in an initial agreement. It cannot mean that where *both parties* (not merely "someone") have arranged in advance to diminish the "length of time" of the payments to instantaneity or zero in a single unconditional transaction, this shall give rise to taxable income because they might possibly have "willed" to effect their deal on a periodical royalty basis.

Next he relies on the sentence providing for withholding on distributable income of a trust. But this is taxable to a citizen, even if he is on a cash basis, whether it is actually distributed to him or not, and is treated likewise in the case of non-resident aliens.

Nor does his citation at page 44 of Article 143-3 of Treasury Regulations 101 seem pertinent. That section merely provides that periodical royalties otherwise taxable are exempt under the Treaty when paid to French subjects.

On the other hand, the following sentence from Article 143-2 seems wholly at variance with the Commissioner's contention:

*"A salesman working by the month for a commission on sales which is paid or credited monthly receives determinable periodical income."*

Could the implication be clearer that a commission paid on account of a single transaction, and not computed with reference to time, is not subject to withholding, because it is not periodical income?



This last quoted sentence epitomizes and gives complete departmental authority to all the less formal rulings cited at pages 22-23, *supra*.

Since the word "royalty" is not listed in the statutory list of income categories subject to withholding, the only permissible ground for including it by regulation would evidently be that it fulfills the requirement of fixed periodicity. But even if the criterion of taxability were to depend on whether the income is of a type that is usually paid periodically, the Court will at once observe that "royalties", if the word includes all types of payment contended for by the Commissioner, are not ordinarily paid periodically. No magazine or newspaper rights, and scarcely any motion picture rights are bought on a fixed periodical basis of payment, and the only literary transactions usually of that nature are book contracts (if based on the number of copies sold) and dramatic contracts (if based on a performance fee or a percentage of the box office receipts).

Surprisingly enough, the Commissioner cites at pages 51-54, in support of the controlling effect of Congressional Committee reports upon statutory language, a careless typographical or clerical error in the House Committee's report on the 1918 Act (1939-1 Cum. Bull. (Part 2) 86, 96), which misquoted the 1917 Act as requiring information at the source only of "any fixed or determinable annual or periodical sum in excess of \$800," whereas the Act actually required such information *whether the income was periodical or not*.

Such an evident error seems to be a strong argument against giving too much weight to the running comments of the Congressional Committees in trying to summarize the multitudinous provisions of the Revenue Acts. It certainly had no effect on the in-

interpretation of the 1917 Act (passed the preceding year), as appears from S. Merten's, Federal Income Taxation, sec. 484, where the author points out that while "in the case of payments of fixed or determinable annual or periodical income to non-resident aliens" withholding returns are treated as information returns, this is not true when the income is fixed or determinable, but not annual or periodical, for then "there is no withholding and returns of information on Forms 1099 and 1096 are necessary." He cites Reg. 103, Sec. 19.147-1; Reg. 101, 94, 86, Art. 147-1; Reg. 77, 74, Art. 811.

Reg. 111, Sec. 174-1; Reg. 103, Sec. 19.147-1; Regs. 101, 94, 86, Art. 147-1; Regs. 77, 74, Art. 811; Regs. 69, 65, 62 and 45, Art. 1071; all contain the sentence: "Although to make necessary a return of information the income must be fixed or determinable, it need not be annual or periodical," followed immediately by a reference to the withholding section, which in each Regulation begins: "Only fixed or determinable annual or periodical income is subject to withholding." The distinction was brought out further in Art. 362, Regs. 62 and 45, where the two elements of the definition of such income were separated, viz "Only (a) fixed or determinable, (b) annual or periodical income is subject to withholding." Moreover, since 1917, millions of information returns and withholding returns have been filed pursuant to the different requirements of the two sections.

From this casual error in a committee report erroneously describing the Revenue Act of the preceding year, the Commissioner apparently concludes that Congress meant to eliminate the words "annual or periodical" years ago—probably in 1917 or 1918—and that the Revenue Acts should have been interpreted accordingly ever since.

The Commissioner at pages 45-47 suggests as a ground for reversal not hitherto urged, that Curtis's rights were limited to 28 years, and would not cover the possible renewal period. The only ground for excluding the possibility of renewal from the sale to Curtis would appear to be that this expectancy was something separate and apart from the original copyright. In view of Avodenhause's age, the expectancy was exceedingly remote, and until this Court's decision in *Fisher Co. v. Wilmark & Sons*, 318 U. S. 643, in 1943, its assignability was doubtful. Quite obviously the parties contemplated only one publication by Curtis, which was a pre-requisite to the starting of the 28-year statutory copyright period, and what happened during the remainder of the 28-year period, or might happen during the possible period of renewal, had no bearing on the amount of the payment. This is in striking contrast with a payment of interest, which is computed wholly in relation to time at a fixed periodical rate.

The Commissioner concludes by assuming that Congress intended (p. 56) "to make non-resident aliens taxable on amounts susceptible of collection of the tax thereon by withholding at source, that is, on amounts which are wholly income when paid". There seems to be no factual basis for this assumption. On the contrary, it seems clear that Congress intended to tax only income *subject*, not *susceptible*, to withholding, and hence not to tax isolated payments of commissions, for example.

The new concept of "amounts which are wholly income when paid" has never been mentioned, we believe, in any Revenue Act or departmental ruling from 1913 to date. And it seems a fundamental weakness in the Commissioner's position that he has been

unable to find any authority in the statutes or in the Treasury's regulations or rulings, either before or after 1936, which even hints that such non-recurrent payments to authors as those here in question have ever been subject to withholding, though such payments have been commonplace at all times since 1913.

A final inconsistency in the Commissioner's position lies in his admission (pp. 57-59) that if Wodehouse had sold his entire copyright to Curtis, the proceeds would not be taxable. Under this theory, if an author licensed the serial rights to one publisher, the book rights to a second, and the motion picture and television rights to a third, for \$100,000 each, in the same year, he would be taxed in excess of \$200,000, while if he sold the whole copyright for \$300,000, he would pay no tax whatever. There is no doubt that Congress has the power to levy such discriminatory taxes, if it wishes. But it would seem strange indeed for the courts to impose such a seemingly unjust result in the face of the plainly expressed intention of Congress, buttressed by an unbroken line of departmental rulings, that only fixed or determinable annual or periodical income is taxable to non-resident aliens like the taxpayer.

## CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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December 1948.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1949.  
No. 84.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent,*

v.

PELHAM G. WODEHOUSE,

*Petitioner.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT.

**PETITION FOR REHEARING.**

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*To the Honorable the Chief Justice and Associate  
Justices of the Supreme Court of the United  
States:*

Your petitioner, Pelham G. Wodehouse, by his attorney, Watson Washburn, respectfully petitions this Court for a rehearing in the above-entitled cause, judgment in which was entered on June 13, 1949, upon the grounds hereinafter set forth.

**Grounds Relied Upon.**

**There Was No Withholding of Tax at Source on Non-Recurring Payments for Serial Rights Prior to 1936.**

The Court, we understand, accepts the taxpayer's contention that only income which would have been properly subject to *withholding* prior to 1936 could

be taxed to him at all under the 1936 and subsequent Revenue Acts, but holds that the payments to the taxpayer here in question would have been so subject, if paid before 1936.

The Court appears to base this conclusion on the assumption of long established administrative practice. This assumption we respectfully submit is wholly false. The Government itself made no such claim in this case, as an examination of its brief discloses, and there is no factual foundation for any such claim in any Treasury pronouncement or publication, which are all to the contrary.

### **The Official Treasury Regulations and Decisions.**

So far as the Treasury Regulations and Decisions are concerned, which are the chief if not the sole authoritative aid to statutory interpretation (see *Biddle v. Commissioner*, 302 U. S. 573, 582), the Court relies mainly on the following paragraph of Treasury Regulations 86, Article 143-2 (1934), and particularly the last sentence, which it italicizes (p. 13 of its opinion):

“Only fixed or determinable annual or periodical income is subject to withholding. The Act specifically includes in such income, interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments. *But other kinds of income are included, as, for instance, royalties.*”

The italicized sentence is apparently the “decisive statement” in support of the supposed withholding practice, referred to at page 12 of the opinion.

In fact, a careful analysis of the history of this paragraph of the Regulations, and particularly of the italicized sentence, in the years 1935 and 1936, prior to and immediately following the crucial 1936 Revenue Act, leads to exactly the opposite conclusion, as we shall try to show.

Throughout the period prior to the 1936 Act all but a very limited category of *dividends* were exempt from withholding, and dividends were not mentioned in the general paragraph of the Regulations quoted above, which was not substantially changed from 1918 through 1934. However, early in the year 1935, to call attention to this limited category, the Regulations were amended by Treasury Decision 4535, approved March 16, 1935 (XIV-1 C. B., 118), by adding to the last sentence the words "*and dividends*", making the last sentence read (italics supplied hereinafter throughout):

"But other kinds of income are included, as, for instance, *royalties and dividends*."

The fact that the Treasury Regulations, thus authoritatively amended by a formal Treasury Decision, conjoined "*royalties*" with "*dividends*", when only a small category of dividends were then subject to withholding, is alone as strong evidence as could be required that the italicized sentence could not mean that *all royalties* were then subject to withholding.

But even stronger proof followed in the next year, for when the 1936 Revenue Act made substantially *all dividends* subject to withholding, the new Regulations, issued immediately after the passage of this Act as Treasury Decision 4649, XV-1 C. B. 49 (later

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incorporated in Article 143-2 of Treasury Regulations 94) transferred *dividends* to the preceding sentence, but left *royalties* in the last sentence, which thus reverted to the language of previous years. Since 1936, the corresponding section of the Regulations has accordingly read as follows:

"Only fixed or determinable annual or periodical income is subject to withholding. The Act specifically includes in such income: interest, *dividends*, rent, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments. *But other kinds of income are included, as, for instance, royalties.*"

It is seldom that changes in the Regulations immediately preceding and following an Act of Congress such as the 1936 Revenue Act could more clearly expound the language of the latter, as officially interpreted by the Treasury Department. This interpretation, we respectfully urge, conclusively confirms the definition implicit in the above quoted paragraph, that "only fixed or determinable annual or periodical \* \* \* royalties" are included in income subject to withholding; and that *all* royalties are *not* so included.

If the statement that "*other kinds of income are included*" (as subject to withholding) "*as, for instance, royalties*", is susceptible (taken apart from its context, background and history) of the same meaning as if the word "*all*" were added before "*royalties*", yet when considered in the light of the changes made in this sentence shortly before and immediately after the 1936 Revenue Act, and in view of the binding effect of Treasury Regulations in the interpretation of any ambiguities in tax statutes, it seems impossible to ascribe any such unlimited coverage to the language

used. And if the language used did not include *all royalties*, it certainly did not include the "royalties" here involved.

The only other provision found in the Treasury Regulations on which the Court relies to establish long-continued practice are the following sentences of Article 143-2 of Treasury Regulations 101, which it describes (p. 25) as "liberal language" which has been used in the Regulations "since 1918":

"The income need not be paid annually if it is paid periodically; that is to say, from time to time, whether or not at regular intervals. That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical."

It is hard to see how the above language, unchanged since 1918, can sustain a consistent administrative practice which, even with respect to sec. 119 (4), was, according to I. T. 2735, *supra*, changed in December, 1933. And in the emphasis on "payment" as a criterion of "periodical income", the sentences surely lend support to an interpretation of "periodical income" which gives weight to the mode of payment. We might note that the paragraph of Regulations 101, from which the above sentences are taken, uses the words "paid" or "payments" no less than nine times, as have similar Regulations from 1918 to date. And since this paragraph has thus become in effect part of the withholding, and now of the taxing statute, as a binding gloss, we respectfully urge that the proper importance placed thereby on *recurring payments* as an element of *periodical income* should not be dismissed as "gratuitous" (pp. 23, 24).



The only portion in the above sentences which seems to broaden the statutory meaning is that which says that income is paid "periodically", if it is paid "from time to time, whether or not at regular intervals." But this seems to lend no support to taxability here, for in the first place the income must be "fixed or determinable", as well as periodical, to be taxable; and secondly, it is clear that no further payment can ever be made to this taxpayer on account of these transactions.

The second sentence above quoted seems entirely irrelevant to this case. It apparently assumes an existing agreement under which a series of *payments* "are to be made" in the future, which "someone" (presumably one of the contracting parties) may extend or prepay, or which are subject to a condition subsequent. As appears from the last three words, the presumed original agreement must have called for "determinable periodical payments," or, substituting the authoritative definitions of the Treasury Regulations, "payments made from time to time, whether or not at regular intervals, where there is a basis of calculation by which the amount to be paid may be ascertained." Such a transaction is wholly at variance with ours.

### **The Informal Treasury Rulings.**

Apart from the Court's official Treasury pronouncements, assumption of pre-1936 withholding usage appears to be based wholly on a single ruling of the Income Tax Unit in December, 1933,—I. T. 2735, XII-2 C. B., 131.

While this ruling is described in the Court's opinion as a "Treasury Decision" (p. 15), it was in fact

merely an Income Tax Unit ruling of the type aptly described by this Court in *Helvering v. New York Trust Co.*, 292 U. S. 455, 468, as follows:

"The rulings, I. T. 1370, 1660 and 1889, cited by the Commissioner were made before the passage of the 1924 Act but they have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law. See cautionary notice published in the bulletins containing these rulings. It does not appear that the attention of Congress had been called to any such construction."

This case was cited with approval in *Riddle v. Commissioner*, 302 U. S. 573, 582, where the Court noted "the fact that departmental rulings not promulgated by the Secretary are of little aid in interpreting a tax statute."

Less than a month ago, the Tax Court in disregarding two "I. T." rulings of four and five years standing remarked that such "rulings are not Treasury Regulations and as a consequence do not have the force and effect that Regulations are accorded."

*Emerson*, decided May 27, 1948, C. C. H. dec. 16,989.

But more important is the fact that this "I. T." dealt solely with the source of income within the United States (I. R. C. sec. 119(4)), and said not a word about withholding. Nor did its reasoning have any relation to the requirements of the withholding section (to which *taxability* was limited by the 1936 Act).

Since the Court has evidently given such weight to I. T. 2735, *supra*, to prove long-established practice as to withholding, even though it made no reference

therefore, we venture to list below a number of informal rulings which actually did deal with withholding,—a point which we did not stress on argument, because the Government's brief made no point of any pre-1936 practice of *withholding*.

If any publication of the Treasury other than its official Regulations and Decisions were deemed important here, it would seem to be the special 60-page Bulletin "B" on "Withholding," first issued in 1920, of which the foreword said:

"This bulletin does not amend the Regulations but amplifies the Regulations. The procedure outlined has been developed as the result of the Bureau's experience, and contains specific instructions for complying with the Regulations. The aim of the Bureau has been to equitably administer the law and this procedure has contributed toward that end."

It contains the following relevant material (p. 11):

*"Income Subject to Withholding."*

"In this class there is included income such as is enumerated in the law—interest, rents, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments. *They are all embraced, however, in the more general class of determinable annual or periodical income.* This phrase refers, generally, to gross income subject to taxation, which is definitely determined or can be ascertained by computation, and is paid from time to time. A salesman who works by the month for a commission on sales and is paid monthly receives income of this char-

acter. *On the other hand, earnings of lawyers and doctors are not usually within the purview of this provision of the law (unless paid as a regular retainer).*

This Bulletin was issued in revised form July 1, 1927, "to aid individuals or organizations in the fulfillment of duties imposed on them by law, in connection with 'Collection of income tax at the source' and 'Information at the source'." Of its 48 pages, 38 dealt with withholding. It repeated the language quoted above and added the following significant new matter:

*"A nonresident alien may receive income from sources within the United States which is taxable but which may not be subject to withholding. Relief from withholding does not mean that the income is exempt from tax."*

*"Income from Sources Within the United States"*

*"Royalties paid to nonresident foreign corporation for the use in the United States of property belonging to such corporation are income from sources within the United States."*

\* \* \*

*"Fixed or Determinable Annual or Periodical Income"*

*"In addition to being from sources within the United States, the income under this title must be fixed or determinable annual or periodical income. Income is fixed when it is to be paid in amounts definitely predetermined. On the other hand, it is determinable whenever there is a basis of calculation by which the amount to be*

paid may be ascertained. The income need not be paid annually if it is paid periodically, that is to say, from time to time, whether or not at regular intervals. That the length of time during which the payments are to be made may be increased or diminished in accordance with some one's will or with the happening of an event does not make the payments any the less determinable or periodical. A salesman working by the month for a commission on sales which is paid or credited monthly receives determinable periodical income. The income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income.

*"The winnings of horses at a race track and credited by racing associations are not fixed or determinable annual or periodical gains, profits, and income."*

*"A commission paid on account of a single transaction is not fixed or determinable annual or periodical income."*

In its issue of May, 1931 (p. 3), the Internal Revenue News published an article by H. C. Armstrong, Office of the General Counsel, which discussed the taxability of the usual book publishing contract, under which the author receives a percentage of sales. Mr. Armstrong said (p. 4): "This indicates an intention on the part of the signers of the contract that it is merely an arrangement for publication of the book on a royalty basis, rather than a sale for a lump sum or at a stipulated price." He concluded (p. 5): "When royalties are fixed by contract and are paid to the non-resident alien author periodically, they come



within the provisions of the statute which require the deduction of income tax at the source from "fixed or determinable annual or periodical gains, profits and income."

In view of the Court's reliance on I. T. 2735, *supra*, we wish to refer particularly to the italicized statement in Bulletin "B", *supra*, that "The winnings of horses at a race-track" are not subject to withholding. This statement was founded on an informal ruling similar to I. T. 2735, but actually dealing with withholding—S. M. 975, C. B. 1, p. 184, (1919). The ruling was cited with approval in G. C. M. 21,575, C. B. 1939-2, p. 172; so that such winnings are now wholly tax-free to non-resident alien owners, though they are obviously income from United States sources and equally obviously not "in the nature of capital gains from profitable sales of real or personal property", to use this Court's words at page 24 of its opinion. That is evidently not the criterion applied by the Treasury to racing profits.

The reason why the Treasury excludes racetrack winnings from the category of "fixed or determinable annual or periodical" income must be that while bettors and book-makers may expect a winning horse to repeat, still (if the race is honestly run) there is no fixed or predetermined basis of calculating at what interval of time (if ever) the horse will win again. The same reasoning, we submit, covers "royalties" of the sporadic type here involved.

Thus we see that non-resident aliens since 1936 have not been subject to tax on speculative gains made here from real estate, security ~~and~~ commodity sales; on agency commissions not paid on a determinable periodical basis; and on race-track winnings. This list of course does not begin to exhaust the category

of income from United States sources which Congress deliberately withdrew from taxability in 1936, but we submit it is sufficient to show the unlikelihood that Congress intended at that time to discriminate against foreign authors, while favoring speculators of all kinds, commissioners, and racing stables,—the last two at all times and speculators since the war, offering no more serious obstacles to collection of the tax than foreign authors, if that is a relevant consideration.

We respectfully urge that there was no administrative practice whatever prior to 1936 to exempt "royalties" from the universal requirement of *fixed or determinable periodicity* to be subject to withholding; that on the contrary the applicable Treasury Regulations, and particularly the changes made therein in 1935 and 1936, are wholly incompatible with any such practice; and that "royalties" here involved would not have been subject to *withholding* prior to 1936, under the law or practice then prevailing; and consequently cannot be held *taxable* since 1936.

### CONCLUSION.

For the reasons stated herein, the petition for a rehearing should be granted.

Respectfully submitted,

WATSON WASHBURN,  
Counsel for Petitioner.

**Certificate of Counsel.**

The undersigned, attorney for petitioner in the above-entitled cause, hereby certifies that the within Petition for Rehearing is presented in good faith and not for delay.

Dated June 24, 1949.

WATSON WASHBURN,  
Counsel for Petitioner.